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TABLE OF CASES REPORTED

	<i>Page</i>
Adams v. Harris.....	189
American Mineral Production Company, Hel-	
sley v.....	571
Anderson, Harkins v.....	545
Anderson v. McGill.....	135
Anderson, Molin v.....	208
Antill v. Lorah.....	680
Armstrong, Raymond v.....	272
Arthaud Land Company, General Motors Accep-	
tance Corporation v.....	593
Ashley v. Cunningham.....	701
Asia Investment Company v. Levin.....	620
Aspelin, State v.....	331
Atkinson, Musgrave v.....	323
Austin, Farmers Market v.....	103
Aylmore v. Bickford.....	28
 Baker v. Central Methodist Church of Spokane...	 402
Barnett Brothers v. Lynn.....	308, 315
Bateman, McDermont v.....	230
Bell's Estate, In re.....	545
Berriat v. Washington Water Power Company...	481
Bickford, Aylmore v.....	28
Birge v. Cunningham.....	458
Blackwell & Company, Frye v.....	107
Blanc's Cafe, Incorporated, v. Corey.....	10
Brallier v. Brallier.....	253
Bremerton, Finn v.....	381

	<i>Page</i>
Broughton, de la Pole v.	395
Brown v. Wilcox Lumber & Logging Company.	336
Burcham, Razzano v.	142
Busy Bee Mining and Development Company v. Olson.	24
Buttignoni, State v.	110
Calmer v. Day.	276
Carlson v. Herbert.	82
Cashmere Apple Company, Leavenworth State Bank v.	356
Catalino, State v.	611
Central Methodist Church of Spokane, Baker v. ...	402
Chase v. Smith.	410
Clausen, Thurston County v.	653
Cole, State v.	511
Coleman v. Coleman.	700
Corey, Blanc's Cafe Incorporated v.	10
County Commissioners of Yakima County, Wyant v.	345
Crothers, State v.	226
Cunningham, Ashley v.	701
Cunningham, Birge v.	458
Cunningham, Davis v.	701
Cunningham, Hatton v.	458
Cunningham, Rothgeb v.	701
Cunningham, Stavosky v.	458
Davis v. Cunningham.	701
Dawson v. Greenfield.	454
Day, Calmer v.	276
de la Pole v. Broughton.	395
de la Pole v. Lindley.	387, 398
Dillabough, Swan v.	132
Donovan, Matson v.	701
Donovan, Savage v.	692

CASES REPORTED.

vii

Page

Dunagan v. School District No. 4 of Snohomish County	160
Duthie & Company, Wright v.....	564
Eldridge Buick Company, Rowell v.....	697
Ellen Mining Company, Huffman v.....	546
Ellensburg, Ellensburg Ice & Cold Storage Com- pany v.....	647
Ellensburg Ice & Cold Storage Company v. Ellensburg	647
Eller, LeBlank v.....	353
Ellis, In re.....	484
Fairhurst, Smith v.....	1
Farmers Market v. Austin.....	103
Ferguson, Irving v.....	37
Finkelberg, Gobel v.....	301
Finn v. Bremerton.....	381
Fischer, Growers & Producers Company of Cali- fornia v.....	16
Fitzpatrick, Hafner v.....	80
Franklin County, Northern Pacific Railway Com- pany v.....	117
Frye v. Blackwell & Company.....	107
Frye & Company v. Merchants' Transportation Company	602
Gaston, Rafferty v.....	689
General Motors Acceptance Corporation v. Arthaud Land Company.....	593
Gibbons, State v.....	171
Gobel v. Finkelberg.....	301
Grandview, In re.....	464
Gray & Barash, Incorporated, v. Puget Sound Navigation Company.....	376
Greenfield, Dawson v.....	454
Gregory, Swenland v.....	640

	<i>Page</i>
Groll, Kuhn v.....	285
Growers & Producers Company of California v. Fischer	16
Gunning v. Muller.....	685
Hafner v. Fitzpatrick.....	80
Hames v. Spokane-Benton County Natural Gas Company	156
Hamilton, State ex rel. Holt v.....	91
Hamrick, Parsons v.....	305
Hand v. School District No. 1, Walla Walla County	439
Hansen, Hoffman v.....	73
Harden v. State Bank of Goldendale.....	234
Harkins v. Anderson.....	545
Harris, Adams v.....	189
Harris v. Seattle.....	327
Hart, State v.....	114
Hatton v. Cunningham.....	458
Helsley v. American Mineral Production Company	571
Herbert, Carlson v.....	82
Herren v. Herren.....	56
Hewitt, Kaufman v.....	556
Heyting, Wright v.....	436
Hines, Ray v.....	530
Hoffman v. Hansen.....	73
Hudson Consolidated Mines Company, Reeder v.	505
Huffman v. Ellen Mining Company.....	546
Hughes v. Hughes.....	262
Humphreys, State v.....	472
Hursley, Calmer v.....	276
Independent Asphalt Paving Company, Wyant v.	345
Inland Empire Farmers' Mutual Life Insurance Company, Menger v.....	514
In re Bell's Estate.....	545
In re Ellis.....	484

CASES REPORTED.

ix

	<i>Page</i>
In re Grandview.....	464
In re Maynes' Estate.....	644
In re Sanderson's Estate.....	250
In re Smith.....	1
In re Stoops' Estate.....	153
Irving v. Ferguson.....	37
Johnson v. Smith.....	146
Jordan, Rumbaugh v.....	539
Kaufman v. Hewitt.....	556
King County, Raine v.....	168
Koska, Spokane Merchants Association v.....	445
Kuhn v. Groll.....	285
Kuskokwim Fishing & Transportation Company, Lincoln v.....	137
Lane, Aylmore v.....	28
Leavenworth State Bank v. Cashmere Apple Com- pany	356
Leavenworth State Bank v. Wenatchee Valley Fruit Exchange.....	366
LeBlank v. Eller.....	353
Levin, Asia Investment Company v.....	620
Lincoln v. Kuskokwim Fishing & Transportation Company	137
Lindley, de la Pole v.....	387, 398
Little Company, White v.....	582
Longtin, West & Wheeler v.....	575
Lorah, Antill v.....	680
Lovelace, State v.....	50
Lowenthal, Tucker v.....	638
Lynn, Barnett Brothers v.....	308, 315
MacCallum-Donahoe Finance Company, Steven- son v.	683
McDermont v. Bateman.....	230
Macdonald, Growers & Producers Company of California v.....	16

	<i>Page</i>
McGill, Anderson v.....	135
Machek v. Seattle.....	42
McKean, Woodland State Bank v.....	451
Matson v. Donovan.....	701
Maynes' Estate, In re.....	644
Menger v. Inland Empire Farmers' Mutual Life Insurance Company.....	514
Mentzer Brothers Lumber Company v. Russell...	528
Merchant's Transportation Company, Frye & Company v.....	602
Metzger v. Metzger.....	479
Miller, Union State Bank of Odessa v.....	321
Molin v. Anderson.....	208
Muller, Gunning v.....	685
Musgrave v. Atkinson.....	323
 New Amsterdam Casualty Company, Molin v.....	 208
Nickert, Olympia v.....	407
North Coast Power Company v. Pittock & Lead- better Lumber Company.....	542
Northern Pacific Railway Company v. Franklin County	117
Northern Pacific Railway Company, Sadler v....	121
Northwest Electric & Water Works, Sunset Shingle Company v.....	416
 Olson v. Busy Bee Mining and Development Com- pany	 24
Olympia v. Nickert.....	407
Oregon-Washington Railroad & Navigation Com- pany, Patterson v.....	536
Oregon-Washington Railroad & Navigation Com- pany, Sunada v.....	241
 Pacific & Eastern Railway Company, Raymond v.	 272
Pacific Telephone & Telegraph Company, Robin- son v.....	318
Parsons v. Hamrick.....	305

Patterson v. Oregon-Washington Railroad & Navigation Company	536
Peshastin Mill Company, Leavenworth State Bank v.....	366
Philadelphia v. State.....	644
Pickard v. Webb.....	244
Pittock & Leadbetter Lumber Company, North Coast Power Company v.....	542
Port of Seattle, Raine v.....	168
Port of Seattle, Woody v.....	163
Pratt v. Wilcox.....	336
Public Service Commission v. State ex rel. Great Northern Railway Company.....	629
Puget Sound Electric Railway, Swanson v.....	4
Puget Sound Navigation Company, Gray & Barash Incorporated v.....	376
Rader, State v.....	198
Rafferty v. Gaston.....	689
Raine v. Port of Seattle.....	168
Ray v. Hines.....	530
Raymond v. Armstrong.....	272
Razzano v. Burcham.....	142
Reeder v. Hudson Consolidated Mines Company	505
Reno v. Reno.....	49
Rice v. Sanderson.....	250
Robinson v. Pacific Telephone & Telegraph Company	318
Rothgeb v. Cunningham.....	701
Rowell v. Eldridge Buick Company.....	697
Rumbaugh v. Jordan.....	539
Russell, Mentzer Brothers Lumber Company v.	528
Sadler v. Northern Pacific Railway Company.....	121
Samish Gun Club v. Skagit County.....	578
Sanderson, Rice v.....	250
Sanderson's Estate, In re.....	250

	<i>Page</i>
S. & G. Fruit Company, Leavenworth State Bank v.....	366
Savage v. Donovan.....	692
Scheuer, Wickens v.....	614
School District No. 4 of Snohomish County, Dunagan v.....	160
School District No. 1 Walla Walla County, Hand v.	439
Seattle, Harris v.....	327
Seattle, Machek v.....	42
Seattle, Society Theatre v.....	258
Seattle, Western Wall Board Company v.....	340
Sheane Auto Company, Warren v.....	213
Siler Mill Company v. United States Spruce Production Corporation.....	97
Sills v. Sills.....	94
Skagit County, Samish Gun Club v.....	578
Smith, Chase v.....	410
Smith v. Fairhurst.....	1
Smith, In re.....	1
Smith, Johnson v.....	146
Smith, Reeder v.....	505
Smith, State ex rel. Deignan v.....	194
Smith v. Telford.....	502
Smith v. Tukwila.....	266
Society Theatre v. Seattle.....	258
Spokane-Benton County Natural Gas Company, Hames v.....	156
Spokane Merchants Association v. Koska.....	445
State v. Aspelin	331
State v. Buttignoni	110
State v. Catalino	611
State v. Cole	511
State v. Crothers	226
State v. Gibbons	171
State v. Hart	114
State v. Humphreys	472

CASES REPORTED.

xiii

	<i>Page</i>
State v. Lovelace	50
State, Philadelphia v.....	644
State v. Rader	198
State v. Tullock	496
State v. Weir	493
State Bank of Goldendale, Harden v.....	234
State ex rel. Buttnick v. Superior Court, King County	604
State ex rel. Carpenter v. Superior Court, King County	664
State ex rel. Cation v. Superior Court, Walla Walla County	217
State ex rel. Deignan v. Smith.....	194
State ex rel. Farmers State Bank of Kahlotus v. Superior Court, Franklin County.....	297
State ex rel. Grays Harbor Commercial Com- pany v. Superior Court, King County.....	674
State ex rel. Great Northern Railway Company, Public Service Commission v.....	629
State ex rel. Holt v. Hamilton.....	91
State ex rel. Kennewick Irrigation District v. Su- perior Court, Walla Walla County.....	517
State ex rel. Pacific Power & Light Company v. Superior Court, Walla Walla County.....	517
Stavosky v. Cunningham.....	458
Stevenson v. MacCallum-Donahoe Finance Com- pany	683
Stoops' Estate, In re.....	153
Sturgeon, Wilbert v.....	551
Sunada v. Oregon-Washington Railroad & Navi- gation Company	241
Sunset Shingle Company v. Northwest Electric & Water Works.....	416
Superior Court, State ex rel. Buttnick v.....	604
Superior Court, State ex rel. Carpenter v.....	664
Superior Court, State ex rel. Cation v.....	217

	<i>Page</i>
Superior Court, State ex rel. Farmers State Bank of Kahlotus v.....	297
Superior Court, State ex rel. Grays Harbor Com- mercial Company v.....	674
Superior Court, State ex rel. Kennewick Irriga- tion District v.....	517
Superior Court, State ex rel. Pacific Power & Light Company v.....	517
Swan v. Dillabough.....	132
Swanson v. Puget Sound Electric Railway.....	4
Swenland v. Gregory.....	640
Telford, Smith v.....	502
Tennant, Aylmore v.....	28
Thurston County v. Clausen.....	653
Tucker v. Lowenthal.....	638
Tukwila, Smith v.....	266
Tullock, State v.....	496
Union State Bank of Odessa v. Miller.....	321
United States Spruce Production Corporation, Siler Mill Company v.....	97
University Street Improvement Company, Blanc's Cafe Incorporated v.....	10
Vaut v. Vaut.....	221
Warren v. Sheane Auto Company.....	213
Washington Water Power Company, Berriat v...	481
Webb, Pickard v.....	244
Weir, State v.....	493
Wenatchee Valley Fruit Exchange, Leavenworth State Bank v.....	366
West & Wheeler v. Longtin.....	575
Western Wall Board Company v. Seattle.....	340
White v. Little Company.....	582
Wickens v. Scheuer.....	614

CASES REPORTED.

xv

Page

Wilbert v. Sturgeon.....	551
Wilcox, Pratt v.....	336
Wilcox Lumber & Logging Company, Brown v....	336
Woodland State Bank v. McKean.....	451
Woody v. Port of Seattle.....	163
Wright v. Duthie & Company.....	564
Wright v. Heyting.....	436
Wyant v. Independent Asphalt Paving Company	345

TABLE

OF

CASES CITED BY THE COURT

			<i>Page</i>
Albring v. Petronio.....	44 Wash.	132.....	463
Allan v. Walla Walla Valley R. Co.	96 Wash.	397.....	127
American Nat. Bank v. Henderson.	123 Ala.	612.....	619
Amos v. United States.....	255 U. S.	313.....	184
Anaconda Copper Min. Co. v. Chi- cago & E. R. Co.....	19 I. C. C.	592.....	635
Anderson v. May.....	50 Minn.	280.....	262
Anderson v. Miami Lum. Co.....	59 Ore.	149.....	281
Anderson v. Wallace Lum. etc. Co..	30 Wash.	147.....	622, 623
Application for License to Practice Law, In re.....	67 W. Va.	213.....	489, 492
Armstrong v. Yakima Hotel Co....	75 Wash.	477.....	78
Ash v. Eriksson.....	115 Minn.	478.....	144
Atkeson v. Jackson Estate.....	72 Wash.	233.....	643
Atrops v. Costello.....	8 Wash.	149.....	642
Atwood v. Atwood.....	15 Wash.	285.....	193
Axe v. Tolbert.....	179 Mich.	556.....	688
Babbitt v. Seattle School District No. 1.....	100 Wash.	392.....	694
Backhaus v. Buells.....	43 Ore.	558.....	317
Baldwin v. Boyd.....	18 Neb.	444.....	144
Baldwin v. Daly.....	41 Wash.	416.....	294
Baldwin's Ex'rs. v. Baldwin.....	7 N. J. Eq.	211.....	401
Ball v. Clothier.....	34 Wash.	299.....	349
Ballard v. Alaska Theatre Co.....	93 Wash.	655.....	508
Barbour v. Hodge.....	99 Wash.	578.....	292, 597
Barnett Brothers v. Lynn.....	118 Wash.	308.....	315
Barr v. Kerfoot Inv. Co.....	90 Wash.	471.....	162
Barrett Mfg. Co. v. Kennedy.....	73 Wash.	503.....	243
Bates v. New York Ins. Co.....	3 Johns Cas. (N.Y.)	238	591, 592
Baum v. Whatcom County.....	19 Wash.	626.....	270
Beach v. Seattle.....	85 Wash.	379.....	127
Belcher v. Tacoma Eastern R. Co..	99 Wash.	34.....	321

			<i>Page</i>
Berkenfield v. People.....	191 Ill.	272.....	501
Birch v. Abercrombie.....	74 Wash.	486.....	694
Blanc's Cafe v. Corey.....	110 Wash.	242.....	13
Bogart v. Pitchless Lum. Co.....	72 Wash.	417.....	568
Bowden v. Walla Walla Valley R. Co.	79 Wash.	184.....	330
Bradley Engineering & Mfg. Co. v. Heyburn	56 Wash.	628.....	295
Braniff v. Baier.....	101 Kan.	117.....	688
Branscheid v. Branscheid.....	27 Wash.	368.....	605
Brodie v. Washington Water Power Co.	92 Wash.	574.....	45, 47
Brommer v. Pennsylvania R. Co....	179 Fed.	577.....	131, 535
Brown v. Hunt & Mottet Co.....	111 Wash.	564.....	339
Brownell v. Hanson.....	109 Wash.	447.....	687, 688
Bruere v. Cook.....	63 N. J. Eq.	624.....	401
Buckley v. New York.....	52 N. Y. Supp.	452.....	591, 592
Buffalo Pitts Co. v. Shriner.....	41 Wash.	146.....	590
Burlington C. R. & N. R. Co. v. Northwestern Fuel Co.....	31 Fed.	652.....	635
Burns v. Commencement Bay Land etc. Co.....	4 Wash.	558.....	337
Butler & Barrow v. McPherson Bros.	95 Miss.	635.....	95
Cable v. Spokane & Inland Empire R. Co.	50 Wash.	619.....	128, 131
Cadwallader v. Louisville N. A. & C. R. Co.....	128 Ind.	518.....	534
Calhoun, Denny & Ewing v. Peder- son	85 Wash.	630.....	268
Canfield v. Westcott.....	5 Cowen (N. Y.)	270.....	625
Carew v. Rutherford.....	106 Mass.	1.....	591
Cartwright v. Gardner.....	5 Cush. (Mass.)	273.....	624
Cattus, In re.....	183 Fed.	733.....	619
Central Oil Co. v. Southern Ref. Co....	154 Cal.	165.....	625
Century Throwing Co. v. Muller....	197 Fed.	252.....	619
Champion v. McCarthy.....	228 Ill.	87.....	232
Charavay & Bodvin v. York Silk Mfg. Co.....	170 Fed.	819.....	619
Chehalis v. Centralia.....	77 Wash.	673.....	526
Cheichi v. Northern Pac. R. Co....	66 Wash.	36.....	150
Chicago & A. R. Co. v. Blaul.....	175 Ill.	183.....	535
Clemmons v. McGeer.....	63 Wash.	446.....	437
Coe, In re.....	183 Fed.	745.....	619
Coffey v. Seattle Elec. Co.....	59 Wash.	686.....	643

CASES CITED.

xix

Page

Cohagen v. Big Bend Land Co.....	109	Wash.	404.....	676
Colby v. Interlaken Land Co.....	88	Wash.	196.....	269
Coleman v. Larson.....	49	Wash.	321.....	69, 71
Colkett v. Hammond.....	101	Wash.	416.....	300
Collins v. Hoffman.....	62	Wash.	278.....	233
Conner v. Clapp.....	42	Wash.	642.....	623
Cowley v. Northern Pac. R. Co.....	68	Wash.	558.....	428, 429
Craig v. Geddis.....	4	Wash.	390.....	269
Croup v. DeMoss.....	78	Wash.	128.....	68
Croup v. Humboldt etc. Min. Co.....	87	Wash.	248.....	292
Crowl v. West Coast Steel Co.....	109	Wash.	426.....	77, 484
Cutler v. Keller.....	88	Wash.	334.....	509
Dana v. St. Paul Inv. Co.....	42	Minn.	194.....	626
Davis v. Isenstein.....	257	Ill.	260.....	626
Davis-Kaser Co. v. Colonial etc. Ins. Co.....	91	Wash.	383.....	677
Decker's Estate, In re.....	105	Wash.	221.....	154
de la Pole v. Broughton.....	118	Wash.	395.....	398
de la Pole v. Lindley.....	118	Wash.	387.....	395, 398
Delaware, L. & W. R. Co. v. Welsh- man	229	Fed.	82.....	535
Delle v. Delle.....	112	Wash.	512.....	3
Del Mar Water, Light & P. Co. v. Eshleman	167	Cal.	666.....	428
DeMattos v. Jordan.....	15	Wash.	378.....	269
Denver v. Spokane Falls.....	7	Wash.	226.....	603
Deschamps' Estate, In re.....	77	Wash.	514.....	252
Dial v. Inland Logging Co.....	52	Wash.	81.....	337
Dickerson v. Cuthburth.....	56	Mo. App.	647.....	144
Di Luck v. Bradner Co.....	111	Wash.	291.....	568
Directors of Fallbrook Irr. Dist. v. Abila	106	Cal.	355.....	92
Dolph v. New York, N. H. & H. R. Co.	74	Conn.	538.....	535
Domrese v. Roslyn.....	89	Wash.	106.....	651
Donahoe v. Franks.....	199	Fed.	262.....	626
Dormitzer v. German Sav. & Loan Soc.	23	Wash.	132.....	393
Downing v. Miltonvale.....	36	Kan.	740.....	409
Dreyfus v. Boone.....	88	Ark.	353.....	55
Dunlap Carpet Co., In re.....	206	Fed.	726.....	619
Dyer v. Dyer.....	65	Wash.	535.....	264
East Hoquiam Co. v. Hoquiam.....	90	Wash.	210.....	471
Edwards v. Seattle, R. & S. R. Co..	62	Wash.	77.....	149, 150
Eickhoff v. Eickhoff.....	29	Colo.	295.....	609

			<i>Page</i>
Eklund v. Hopkins.....	36 Wash.	179.....	450
Engelking v. Spokane.....	59 Wash.	77.....	150
Eyers v. Burbank Co.....	97 Wash.	220.....	216
Faircloth v. Webb.....	125 Ga.	230.....	279
Farley v. Letterman.....	87 Wash.	641.....	590
Fellows v. Los Angeles.....	151 Cal.	52.....	166
Ferguson v. McBean.....	91 Cal.	63.....	313
Field v. Spokane etc. R. Co.....	64 Wash.	445.....	127
First Nat. Bank v. Mt. Pleasant Milling Co.....	103 Iowa	518.....	619
First Security & Loan Co. v. Engle- hart	107 Wash.	86.....	133
Fogg v. New York, N. H. & H. R. Co.	223 Mass.	444.....	534
Foley v. State.....	42 Neb.	233.....	409
Ford v. Kimble.....	41 Wash.	573.....	256
Foster v. Commissioners of Cowlitz County	100 Wash.	502.....	662
French v. Seattle Traction Co.....	26 Wash.	264.....	303
Friedman v. Branner.....	72 Wash.	338.....	450
Galen Hall Co. v. Atlantic City....	76 N. J. L.	20.....	409
Galland's Estate, In re.....	103 Wash.	106.....	400
Garrick v. Jones.....	2 Ga. App.	382.....	279
Glenn v. Glenn.....	84 Wash.	215.....	264
Gordon & Ferguson v. Doran.....	100 Minn.	343.....	543
Great Lakes Towing Co. v. Mill Transp. Co.....	155 Fed.	11.....	312, 317
Gregg v. King County.....	80 Wash.	196.....	87
Griffin v. Warburton.....	23 Wash.	231.....	245
Griffith v. Griffith.....	71 Wash.	56.....	606, 607
Guthrie v. Field.....	85 Kan.	58.....	438
Habermann v. Ellensburg Gas & W. Co.....	100 Wash.	229.....	651
Hall Co. v. Jersey City.....	62 N. J. Eq.	489.....	343
Hammel v. Fidelity Mutual Aid Ass'n.	42 Wash.	448.....	677
Harris v. Johnson.....	75 Wash.	291.....	576
Harsin v. Oman.....	68 Wash.	281.....	574
Hartman v. Thompson.....	104 Md.	389.....	312
Hartness v. Brown.....	21 Wash.	655.....	232
Harvey v. Ivory.....	35 Wash.	397.....	78, 153
Hatton v. Robinson.....	14 Pick. (Mass.)	416.....	232
Hayworth v. McDonald.....	67 Wash.	496.....	676

CASES CITED.

xxi

			<i>Page</i>
Heal v. Evans Creek Coal etc. Co..	71 Wash.	225.....	326
Heffron v. Pollard.....	73 Tex.	96.....	312
Hemrich v. Hemrich.....	117 Wash.	124.....	246
Herrett v. Puget Sound T., L. & P. Co.	103 Wash.	101.....	330
Hewitt Logging Co. v. Northern Pac. R. Co.....	97 Wash.	597.....	321
Hitchcock v. Board of Home Mis- sions	259 Ill.	288.....	401
Hoffman v. Hansen.....	118 Wash.	73.....	153
Horton v. Donohoe Kelly Banking Co.	15 Wash.	399.....	296
Hoscheid's Estate, In re.....	78 Wash.	309.....	350
Howard v. Hopkyns.....	2 Atk.	371.....	624
Hoyle v. Northern Pac. R. Co.....	105 Wash.	652.....	128, 129, 131
Hyser v. Commonwealth.....	116 Ky.	410.....	112, 113
Ilfeld v. Ziegler.....	40 Colo.	401.....	317
Itasca Cedar & Tie Co. v. Brainerd Lum. & Merc. Co.....	109 Minn.	120.....	283
Jackson v. Ferguson.....	2 La. Ann.	723.....	141
Jenkinson v. Auditor General.....	104 Mich.	34.....	463
Johnson v. Johnson.....	85 Wash.	18.....	77, 483
Jones & Co. v. Ellenfeldt.....	28 Wash.	687.....	622
Jordan v. Peek.....	103 Wash.	94.....	293
Judevine v. Jackson.....	18 Vt.	470.....	463
Jump v. North British etc. Ins. Co.	44 Wash.	596.....	515
Kakeldy v. Columbia & P. S. R. Co.	37 Wash.	675.....	651
Kanton v. Kelly.....	65 Wash.	614.....	44, 46
Karns v. Olney.....	80 Cal.	90.....	312
Katterhagen v. Meister.....	75 Wash.	112.....	251
Kentucky & I. Bridge & R. Co. v. Singheiser	115 S. W. (Ky.)	192.....	535
Kimble v. Kimble.....	17 Wash.	75.....	605
Klepsch v. Donald.....	4 Wash.	436.....	384
Koch v. Streuter.....	218 Ill.	546.....	626
Kranzusch v. Trustee Co.....	93 Wash.	629.....	643
Kuehl v. Edmonds.....	91 Wash.	195.....	662
Landis v. Vineland.....	61 N. J. L.	424.....	462
Lapham v. Flint.....	86 Minn.	376.....	688
Lawrence v. Pederson.....	34 Wash.	1.....	622
Lauber v. Johnston.....	54 Wash.	59.....	379
Leavenworth S. Bank v. Cashmere Apple Co.	118 Wash.	356.....	367, 369, 370

			<i>Page</i>
Lewis v. Lewis.....	83 Wash.	671...50, 606, 607, 608	
Lindsay v. Pennsylvania R. Co.....	78 N. J. L.	704.....	535
Lindstrom v. Seattle Taxicab Co....	116 Wash.	307.....	86
Longmire v. Yakima Highlands Irr. & L. Co.....	95 Wash.	302.....	652
Ludberg v. Barghoorn.....	73 Wash.	476.....	694, 696
Lundberg v. Kitsap County Bank..	79 Wash.	75.....	291
Lyon v. Nourse.....	104 Wash.	309.....	684
McAuliff v. Parker.....	10 Wash.	141.....	133
McDaniel v. Pressler.....	3 Wash.	636.....	372
McDonald v. McCoy.....	121 Cal.	55.....	317
MacFarlane v. Allan-Pfeiffer Chem- ical Co.....	59 Wash.	154.....	109, 110
McKnight v. United States.....	115 Fed.	972.....	188
McMaster v. Advance Thresher Co.	10 Wash.	147.....	677, 678
McMillen v. Hillman.....	66 Wash.	27.....	385
McQuesten v. Morrill.....	12 Wash.	335.....	133
Malsch v. Waggoner.....	62 Wash.	470.....	457
Manley v. Park.....	68 Kan.	400.....	372
Martin v. Barbour.....	140 U. S.	634.....	463
Martin's Estate, In re.....	82 Wash.	226.....	155
Maryland Casualty Co. v. Seattle Elec. Co.....	75 Wash.	430.....	151
Mather v. Gordon.....	77 Conn.	341.....	619
Matson v. Johnson.....	48 Wash.	256.....	191, 193
Maxwell v. Harper.....	51 Wash.	351.....	191, 192, 193
Meeker v. Sprague.....	5 Wash.	242.....	300
Merchants' Bank v. Superior Candy etc. Co.....	41 Wash.	653.....	106
Meshner v. Osborne.....	75 Wash.	439.....	45, 46, 47
Metcalf v. Kent.....	104 Iowa	487.....	688
Metzger v. Sigall.....	83 Wash.	80.....	295
Migge v. Northern Pac. R. Co.....	75 Wash.	197.....	643
Miller v. Brown.....	115 Wash.	177.....	687
Miller v. Reeves.....	101 Wash.	642.....	162
Minneapolis Threshing M. Co. v. Hutchins	65 Minn.	89.....	590
Monk v. Ballard.....	42 Wash.	35.....	467
Montgomery v. Missouri Pac. R. Co.	181 Mo.	508.....	535
Moody v. Travis.....	76 Ga.	832.....	283
Moore v. Brownfield.....	7 Wash.	23.....	133
Moore v. Spokane.....	88 Wash.	203.....	471
Moors v. Kidder.....	106 N. Y.	32.....	619
Morse v. Johnson.....	88 Wash.	57.....	252
Mosso v. Stanton Co.....	75 Wash.	220.....	538

CASES CITED.

xxiii

			<i>Page</i>
Moundsville v. Velton.....	35 W. Va.	217.....	409
Mound Water Co. v. Southern Cali- fornia Edison Co.....	184 Cal.	602.....	428
Mudgett v. Clay.....	5 Wash.	103.....	69
Murphy v. Chicago, Milwaukee & St. P. R. Co.....	66 Wash.	663.....	150
Myrberg v. Baltimore & S. M. & R. Co.	25 Wash.	364.....	384
Nasser v. Gaston.....	70 Wash.	685.....	383
National Fire Proofing Co. v. Daly	76 N. J. Eq.	35.....	343
Neeson v. Smith.....	47 Wash.	386.....	622
Nelson v. Davenport.....	108 Wash.	259.....	568
Newburgh Turnpike Co. v. Miller..	5 Johns. Ch. (N. Y.)	101..	489
Newell v. Lamping.....	45 Wash.	304.....	623
Newell v. New Holstein Canning Co.	119 Wis.	635.....	362, 363
Newell's Appeal.....	24 Pa.	197.....	401
Newton v. Hull.....	90 Cal.	487.....	624
New York Institution etc. v. How's Ex'rs.	10 N. Y.	84.....	401
Niday, Ex parte.....	15 Idaho	559.....	232
Ninth Avenue, In re.....	79 Wash.	674.....	471
North Idaho Grain Co. v. Callison..	83 Wash.	212.....	379
North Stockton etc. Co. v. Fischer..	138 Cal.	100.....	625
Olsen v. Hagan.....	102 Wash.	321.....	372
Olsen v. Smith.....	84 Wash.	228.....	339
Orr v. Schwager & Nettleton.....	74 Wash.	631.....	78
Pacific Bridge Co. v. United States F. & G. Co.....	33 Wash.	280.....	270
Pacific Coast Biscuit Co. v. Perry..	77 Wash.	352.....	326
Pacific L. & M. Co. v. Rudebeck....	15 Wash.	336.....	379
Pardee's Appeal.....	100 Pa. St.	408.....	279
Parks v. Elmore.....	59 Wash.	584.....	430
Parmenter v. McDougall.....	172 Cal.	306.....	131
Patterson, In re.....	98 Wash.	334.....	468
Payette v. Ferrier.....	20 Wash.	479.....	256
People v. Marxhausen.....	204 Mich.	559.....	187
People v. Schoonmaker.....	63 Barb. (N. Y.)	44.....	343
People v. Zentgraf.....	193 Pac. (Cal. App.)	274....	476
People's National Bank v. Myers...	65 Kan.	122.....	105
Philadelphia & R. R. Co. v. Le Barr.	265 Fed.	129.....	535
Phoenix Min. & M. Co. v. Scott....	20 Wash.	48.....	549
Pierce v. Batten.....	3 Kan. App.	396.....	239
Pine Street, In re.....	57 Wash.	178.....	471

			<i>Page</i>
Pinkum v. City of Eau Claire.....	81 Wis.	301.....	275
Pitt v. Little.....	58 Wash.	355.....	294
Planters' Compress Co. v. Cleveland			
C. C. & St. L. R. Co.....	1 I. C. C.	382.....	635
Pleins v. Wachenheimer.....	108 Minn.	342.....	312
Portland v. Yick.....	44 Ore.	439.....	409
Providence Coal Co. v. Providence			
& W. R. Co.....	11 I. C. C.	107.....	635
Puget Sound Lum. Co. v. Krug.....	89 Cal.	237.....	317
Puget Sound State Bank v. Gallucci	82 Wash.	445.....	270
Radich v. Hutchins.....	95 U. S.	210.....	591
Rawlings v. Heal.....	111 Wash.	218.....	252
Ray v. Hines.....	118 Wash.	530.....	538
Raymond v. Caton.....	24 Ill.	123.....	624
Raymond v. Willapa Power Co.....	102 Wash.	278.....	274
Raymond Lum. Co. v. Raymond			
L. & W. Co.....	92 Wash.	330.....	428
Real Estate Inv. Co. v. Spokane....	59 Wash.	416.....	468
Rebillard v. Minneapolis etc. R. Co.	216 Fed.	503.....	131
Reese v. Olsen.....	44 Utah	318.....	501
Reformed Presbyterian Church v.			
McMillan	31 Wash.	643.....	401
Richman v. Wenaha Co.....	74 Wash.	370.....	677
Riddell v. Prichard.....	12 Wash.	601.....	372
Riggs v. Denniston.....	3 Johns. Cas. (N. Y.)	198..	232
Robinson v. Oregon-Washington			
Nav. Co.....	90 Ore.	490.....	131
Roby v. Kansas City S. R. Co.....	130 La.	880.....	535
Rogers v. Rogers.....	81 Wash.	502.....	264
Rogers v. Trumbull.....	32 Wash.	211.....	134
Rosenheim, Ex parte.....	83 Cal.	388.....	501
Rothchild Bros. v. Rollinger.....	32 Wash.	307.....	93
Rowell v. Smith.....	123 Wis.	510.....	283
Roy v. Vaughan.....	100 Wash.	345.....	217
Ruddy v. Rossi.....	248 U. S.	104.....	144
Sacajawea Lum. etc. Co. v.			
Skookum Lum. Co.....	116 Wash.	75.....	158
Samish River Boom Co. v. Union			
Boom Co.	32 Wash.	586.....	525
Sanitary Reduction Wks. v. Califor-			
nia Reduction Co.....	94 Fed.	693.....	54
Scanlan v. Grimmer.....	71 Minn.	351.....	312
Scholey v. Mumford.....	60 N. Y.	498.....	591
School District No. 75 v. Qualls....	95 Wash.	247.....	269

CASES CITED.

xxv

			<i>Page</i>
Schultz v. Levy.....	33 Ore.	373.....	144, 145
Schumacher v. Brand.....	72 Wash.	543.....	457
Sears v. Williams.....	9 Wash.	428.....	270
Seattle v. Barto	31 Wash.	141.....	56
Seattle v. Chin Let.....	19 Wash.	38.....	261
Seattle v. Hewetson	95 Wash.	612.....	261
Seattle v. MacDonald	47 Wash.	298.....	261
Seattle v. Pearson	15 Wash.	575.....	408
Sedro-Woolley v. Willard.....	71 Wash.	646.....	385
Segari v. Mazzel.....	116 La.	1026.....	211
Shaser v. Olympia.....	92 Wash.	466.....	467
Sheffield v. Union Oil Co.....	82 Wash.	386.....	86
Sherris v. Northern Pac. R. Co.....	55 Mont.	189.....	131
Showalter v. Spangle.....	93 Wash.	326.....	192, 193
Shuey v. Holmes.....	22 Wash.	193.....	296
Shurtleff v. United States.....	189 U. S.	311.....	41
Siegloch v. Iroquois Min. Co.....	106 Wash.	632.....	509
Sievers v. Dalles, Portland etc.			
Nav. Co.....	24 Wash.	302.....	243
Simmons v. Macomber.....	60 Wash.	469.....	579
Sitton v. Dubois.....	14 Wash.	624.....	324, 325, 326
Smith v. Ayer	101 U. S.	320.....	239
Smith v. Emporia	27 Kan.	528.....	409
Smith v. Griffin.....	32 Ga.	81.....	239
Smith v. Lambert Transfer Co....	109 Wash.	529.....	625
Smith v. Spokane	55 Wash.	219.....	54
Sparks v. Dispatch Transfer Co....	104 Mo.	531.....	312
Spokane v. Fonnell	74 Wash.	417.....	471
Spokane v. Griffith	49 Wash.	293.....	409
Spokane, Portland & S. R. Co. v.			
Franklin County.....	106 Wash.	21.....	117
Stanley v. Stanley.....	27 Wash.	570.....	233
State v. Armstrong	37 Wash.	51.....	476
— v. Blaine	64 Wash.	122.....	512
— v. Bodeckar	11 Wash.	417.....	612
— v. Bokien	14 Wash.	403.....	494
— v. Carey	4 Wash.	424.....	612
— v. Curtis	108 Kan.	537.....	476
— v. Cushing	17 Wash.	544.....	478
— v. Dale	110 Wash.	181.....	303
— v. Dolan	17 Wash.	499.....	115
— v. Greenwald	116 Wash.	463.....	513
— v. Hagimori	57 Wash.	623.....	261
— v. Hennessy	114 Wash.	351.....	332
— v. Hinton	56 Ore.	428.....	499
— v. Jackson	83 Wash.	514.....	188

			<i>Page</i>
State v. Koerner	103 Wash.	516.....	612, 613
— v. LePitre	54 Wash.	166.....	112
— v. Manderville	37 Wash.	365.....	304
— v. Marion	68 Wash.	675.....	476
— v. Moser	98 Wash.	481.....	612, 613
— v. Muller	80 Wash.	368.....	612
— v. Pacific American Fisheries	73 Wash.	37.....	228
— v. Parker	114 Wash.	428.....	479
— v. Sanford	67 Conn.	286.....	113
— v. Shepherd	177 Mo.	205.....	334
— v. Swager	110 Wash.	431.....	498
— v. Turner	115 Wash.	170.....	175, 512, 513
— v. Walters	7 Wash.	246.....	303, 477
— v. Wilcox	114 Wash.	14.....	478
— v. Williams	36 Wash.	143.....	115
— v. Woods	116 Wash.	140.....	175, 315
State Bank of Black Diamond v.			
Johnson	104 Wash.	550.....	598
State ex rel. Adjustment Co. v. Su-			
perior Ct.	67 Wash.	355.....	372
— American Sav. Bank etc. Co.			
v. Superior Ct.....	116 Wash.	122.....	676
— Bartelt v. Liebes.....	19 Wash.	589.....	270
— Cascade Public Serv. Corp. v.			
Superior Ct.....	53 Wash.	321.....	526
— Ellertsen v. Home Tel. & Tel.			
Co.	102 Wash.	196.....	321
— First Thought Gold Mines v.			
Superior Court	93 Wash.	433.....	120
— Goss v. Metaline Falls L. &			
W. Co.	80 Wash.	652.....	320
— Hall v. Savidge	93 Wash.	696.....	93
— Harris v. Superior Ct.....	42 Wash.	660.....	427
— Home Tel. & Tel. Co. v. Supe-			
rior Ct.	110 Wash.	396.....	321
— Hyland v. Peter.....	21 Wash.	243.....	92
— Lloyd v. Superior Ct.....	55 Wash.	347.....	608, 609
— Lopas v. Shagren.....	91 Wash.	48.....	41
— Nicomen Boom Co. v. North			
Shore Boom & Driving Co.	55 Wash.	1.....	490
— Owen v. Superior Ct.....	110 Wash.	49.....	677
— Public Serv. Comm. v. Spo-			
kane & I. E. R. Co.....	89 Wash.	599.....	427
— Seattle & Lake Washington			
W. Co. v. Superior Ct.....	86 Wash.	657.....	676
— Shropshire v. Superior Ct...	51 Wash.	386.....	427

CASES CITED.

xxvii

				<i>Page</i>
State ex rel. Skamania Boom Co.				
v. Superior Ct.....	47	Wash.	166.....	526
— South Fork Log Driving Co.				
v. Superior Ct.	102	Wash.	460.....	526
— Swan v. Taylor.....	21	Wash.	672.....	228
— Tacoma Industrial Co. v.				
White River Power Co....	39	Wash.	648.....	427
— Tolt Power etc. Co. v. Supe-				
rior Ct.	50	Wash.	13.....	427
— Union T. & Sav. Bank v. Su-				
perior Ct.	84	Wash.	20.....	526
— Washington Boom Co. v. Che-				
halls Boom Co.....	82	Wash.	509.....	526
— Wells Lum. Co. v. Superior				
Ct.	113	Wash.	77.....	676, 678
— Young v. Superior Ct.....	85	Wash.	72.....	605
Steiner v. State.....	78	Neb.	147.....	409
Stewart & Holmes Drug Co. v. Reed	74	Wash.	401.....	292
Strandall v. Alaska Lum. Co.....	73	Wash.	67.....	676
Sturgis v. McElroy.....	113	Wash.	192.....	224
Sultan R. & Timber Co. v. Great				
Northern R. Co.....	58	Wash.	604.....	430
Sunset Copper Co. v. Black.....	115	Wash.	132.....	591
Swanson v. Puget Sound Elec. R....	118	Wash.	4.....	538
Swartz v. Ballou.....	47	Iowa	188.....	438
Sweeten v. Pacific P. & L. Co.....	88	Wash.	679.....	642
Swigart v. Lusk.....	196	Mo. App.	471.....	535
Tacoma v. Nisqually Power Co.....	57	Wash.	420.....	427
Tacoma Grocery Co. v. Barlow.....	12	Wash.	21.....	643
Thatcher v. Capeca.....	75	Wash.	249.....	193
Thompson v. Seattle, Renton & S.				
R. Co.	71	Wash.	436.....	47
Thompson's Estate, In re.....	110	Wash.	635.....	133
Thompson-Spencer Co. v. Thompson	61	Wash.	547.....	603
Thomson & Stacy Co. v. Evans,				
Coleman & Evans.....	100	Wash.	277.....	262
Thorberg v. Hoquiam.....	77	Wash.	679.....	651
Thornburgh v. Fish.....	11	Mont.	53.....	626
Thurman v. Kildall.....	80	Wash.	283.....	641
Titus v. Montesano.....	106	Wash.	608.....	384
Tripler v. New York.....	125	N. Y.	617.....	591
Union Feed Co. v. Pacific Clipper				
Line	31	Wash.	28.....	552
United States Fld. & Guar. Co. v.				
Lee	58	Wash.	16.....	251
Upham's Estate, In re.....	127	Cal.	90.....	401

			<i>Page</i>
Van Der Creek v. Spokane.....	78 Wash.	94.....	467
Velikanje v. Dickman.....	98 Wash.	584.....	69
Vermont Loan & Trust Co. v. Greer	19 Wash.	611.....	490
Victor Safe & Lock Co. v. O'Neil...	48 Wash.	176.....	268
Von Tobel v. Stetson & Post Mill Co.	32 Wash.	683.....	371
Wallowa National Bank v. Riley...	29 Ore.	289.....	144
Walsh, Boyle & Co. v. First Nat. Bank	228 Ill.	446.....	619
Ward v. Magaha.....	71 Wash.	679.....	133
Washington Printing Co. v. Osner..	99 Wash.	537.....	603
Waterson v. Chicago, M. & St. P. R. Co.....	164 Wis.	375.....	534
Watkins Land-Mortgage Co. v. Mul- len	62 Kan.	1.....	144
Weber v. Snohomish Shingle Co.,...	37 Wash.	197.....	643
Weider v. Osborn.....	20 Ore.	307.....	239
Western Farquhar Machinery Co. v. Pierce.....	108 Wash.	621.....	590
Westervelt v. Huiskamp.....	101 Iowa	196.....	625
West Marginal Way, In re.....	112 Wash.	418.....	471
Weyerhaeuser T. Co. v. Pierce County	97 Wash.	534.....	580
Wheeler, In re.....	115 N. Y. Supp.	605.....	166
White v. Portland Gas & Coke Co..	84 Ore.	643.....	131
White v. Watts.....	118 Iowa	549.....	193
Whitman County v. United States Fid. & Guar. Co.....	49 Wash.	150.....	677
Whitney v. Stone.....	23 Cal.	275.....	624
Whitten v. Silverman.....	105 Wash.	238.....	92
Whittlesey v. Seattle.....	94 Wash.	645.....	46
Wickersham v. Johnston.....	104 Cal.	407.....	239
Wilcoxson v. Stitt.....	65 Cal.	596.....	625
Willapa Power Co. v. Public Serv. Comm.	110 Wash.	193.....	676
Williams v. Blumenthal	27 Wash.	24.....	233
Wilson v. Beyers.....	5 Wash.	303.....	53
Wilson v. Puget Sound Elec. R....	52 Wash.	522.....	127, 128
Wilson's Estate, In re.....	111 Wash.	491.....	402
Winningham v. Holloway.....	51 Ark.	385.....	239
Winton Motor Carriage Co. v. Broadway Auto Co.....	65 Wash.	650.....	292, 598
Wolcott v. New York & L. B. R. Co.	68 N. J. L.	421.....	535
Wonderful Group Min. Co. v. Rand.	111 Wash.	557.....	158
Woody v. Port of Seattle.....	118 Wash.	163.....	168, 169, 170
Wright v. Suydam.....	72 Wash.	587.....	623, 628
Yamamoto v. Puget Sound Lum. Co.	84 Wash.	411.....	372

STATUTES

CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.		PIERCE'S CODE— <i>Continued.</i>	
	<i>Page</i>		<i>Page</i>
Art. 1 §§ 7, 9	184	Section 7765.....	384
“ 2 § 1 (Amend. 7)	176	“ 7812.....	643
“ 7 § 9	471	“ 8006.....	242
“ 11 § 11	54	“ 8255.....	576
		“ 8264.....	641
REMINGTON & BALLINGER'S CODE.		“ 8271.....	158
Section 955, 956.....	118	“ 8272.....	371
“ 2527.....	227	“ 8374.....	408
“ 3660.....	324	“ 8376.....	408, 409, 698
“ 4509.....	441	“ 8380.....	159
“ 4910-10.....	38	“ 8438, 8439.....	242
“ 9219.....	118	“ 8485.....	139
		“ 8504.....	643
PIERCE'S CODE.		“ 8543, 8544.....	677
Section 703.....	342	“ 8702.....	500
“ 795.....	54	“ 8725.....	512
“ 797.....	53	“ 8965, 8966, 8967.....	261
“ 1001.....	469, 470	“ 8995, 9000.....	201
“ 1003.....	468	“ 9139.....	206
“ 1009.....	466	“ 9311, 9320.....	501
“ 2388.....	166	“ 9666, 9667.....	324
“ 2403.....	166	“ 9679.....	277, 278, 282
“ 3223.....	461	“ 9680.....	282
“ 3226.....	461, 462	“ 9689 <i>et seq.</i>	277
“ 3703.....	498	“ 9691.....	277
“ 4095.....	577	“ 9705.....	26
“ 4100.....	295	“ 9724 to 9728.....	269
“ 4193.....	294	“ 9737.....	277, 278, 282, 283
“ 4256.....	577	“ 9741.....	338
“ 5161.....	668	“ 9767, 9768.....	598
“ 5166, 5167.....	668, 672	“ 9935.....	251
“ 5579.....	544		
“ 5993 <i>et seq.</i>	218	REMINGTON'S CODE.	
“ 6939.....	579	Section 179.....	576
“ 7725.....	232	“ 183, 184, 195,	
“ 7738.....	382	43, 44, 46, 48
“ 7747.....	598	“ 184.....	641
“ 7748, 7749, 7751.....	449		

REMINGTON'S CODE—*Continued.*

	<i>Page</i>
Section 190.....	158
“ 191.....	371
“ 206, 207, 208....	677, 678
“ 226, subd. 4.....	242
“ 226, subd. 9.....	242, 243
“ 291.....	408, 409, 698
“ 296.....	159
“ 296, subds. 1, 7....	159
“ 322.....	139
“ 339, 384.....	643
“ 687.....	242
“ 1129.....	26
“ 1149....	277, 278, 282, 283
“ 1153.....	338
“ 1159, 1159-1.....	269
“ 1160, 1161, 1161-1....	269
“ 1162.....	277, 278, 282
“ 1163.....	282
“ 1172 <i>et seq.</i>	277
“ 1174.....	277
“ 1188, 1189.....	324
“ 1214, subd. 2.....	232
“ 1230-1.....	384
“ 1243.....	382
“ 1260½.....	408
“ 1491.....	237, 238
“ 1500.....	350
“ 2200, 2209.....	501
“ 2267.....	500
“ 2290.....	512
“ 2308.....	206
“ 2390-2393, 2395.....	201
“ 2646, 2465, 2466....	261
“ 3156 <i>et seq.</i>	498
“ 3415.....	577
“ 3420.....	295
“ 3512.....	294
“ 3575.....	577
“ 3660.....	324
“ 3670, 3671.....	598
“ 4481, 4509.....	442
“ 4657, 4663.....	668
“ 4662.....	672
“ 4998, 5013.....	166

REMINGTON'S CODE—*Continued.*

	<i>Page</i>
Section 5291.....	598
“ 5296, 5297, 5299....	449
“ 5623 <i>et seq.</i>	218
“ 5633.....	219
“ 5755.....	349
“ 6262-22.....	173
“ 6418.....	92
“ 6442.....	461
“ 6444.....	463
“ 6445.....	461, 462
“ 6604-2, 6604-3, 6604-4.	76
“ 7092.....	498
“ 7671-12.....	54
“ 7671-14.....	53
“ 7892-13.....	469, 470
“ 7892-15.....	468
“ 7892-21, 7892-22....	466
“ 7995.....	342
“ 8165-4.....	164, 170
“ 8626.....	320
“ 8626-52.....	544
“ 9102.....	579
“ 9199.....	645
“ 9747.....	324

SESSION LAWS.

1889-1890, p. 671.....	92
1895, pp. 432, 433.....	92
1905, p. 199.....	646
1909, p. 184, § 1, subd. 4....	643
p. 198, § 1, subd. 4.....	643
p. 285, § 2.....	441
p. 286, § 2, subd. 7.....	442, 443
p. 293, § 16, subd. 10....	442, 443
p. 294.....	442
1911, p. 452, § 21.....	466
p. 455, § 23.....	467
1913, p. 611.....	654
1915, p. 2.....	111-114
p. 14.....	173
p. 16, § 32.....	111
p. 17.....	176, 177, 179
p. 492, § 2.....	227
p. 655, § 14, subd.a.....	53

SESSION LAWS—*Continued.*

	<i>Page</i>
1915, p. 658, subd.r.....	53
1917, p. 60, § 11.....	111, 173, 174
p. 61, § 15.....	111-114, 173
p. 448, § 4.....	525
p. 495, § 2.....	43
p. 501.....	170
p. 517, § 1.....	662
p. 517, §§ 5, 6.....	662
p. 518, § 3.....	658
p. 518, § 5.....	659
p. 519, § 6.....	659
p. 523, § 16.....	658
p. 597.....	645
p. 642.....	133, 237
p. 654, § 49.....	251
p. 672, § 107.....	132
p. 689, § 163.....	154
p. 706, § 220.....	154

SESSION LAWS—*Continued.*

	<i>Page</i>
1917, p. 707, §§ 222, 223.....	133
1919, p. 475, § 23.....	37
1921, p. 179.....	666, 667
p. 181, § 5.....	667, 673
p. 181, § 6.....	668, 672
p. 407.....	486
p. 409, § 3.....	486
p. 411, § 3.....	487
p. 411, § 9.....	486, 490, 492
p. 411, § 9, subds. 1, 2, 3, 486-488	
p. 412, § 10.....	487, 488, 491
p. 417, § 19.....	487
p. 665.....	441, 444

ORDINANCES.

Grandview, No. 133.....	466
Seattle, No. 38,045, § 101....	125
Spokane, Nos. C-1832, C-2565	698
Vancouver, No. 578, § 6.....	55

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CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 16547. Department Two. December 9, 1921.]

*In the Matter of the Application of OBIE L. SMITH for
a Writ of Habeas Corpus.*

OBIE L. SMITH, *Appellant*, v. WILLIAM C. FAIRHURST *et*
*al., Respondents.*¹

PARENT AND CHILD (2)—AGREEMENTS AS TO CUSTODY OR CONTROL—CONTRACTS—PUBLIC POLICY. An agreement by a father giving the care and custody of an infant child to its grandparents during their life, which has not been made the basis of a legal adoption by the grandparents is void as against public policy.

HABEAS CORPUS (19)—PARTICULAR ISSUES—CUSTODY OF CHILD. A parent who has granted the care and custody of a minor child to another under a void contract is entitled to its return under writ of habeas corpus, where there is satisfactory evidence of his ability, willingness and qualification to properly care for and rear the child.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 21, 1921, denying an application for a writ of habeas corpus to secure the custody of a child. Reversed.

Egan & Moriarty, for appellant.

C. H. Hanford, for respondents.

MACKINTOSH, J.—In 1919, the petitioner's wife, who was the daughter of the respondents, died, leaving a

¹Reported in 202 Pac. 243.

baby girl, then of the age of fourteen months. The petitioner and his child continued to live with the respondents, who are elderly people, and on December 18, 1919, this agreement was entered into:

“
“Now, therefore, the parties hereto agree as follows, to-wit:

“The first party agrees that the second party shall during the life of the second party act as guardian of said minor child, Marian Julia May Smith, and that said minor child shall at all times live with and be cared for by second party (respondent) hereby investing said party with all the rights, duties and privileges of a parent in the control and upbringing of said child.”

The household continued in the same condition for about a year more, when the petitioner ceased to live with the respondents, although he continued to make full provision for the child. The petitioner then married, and being desirous of taking his child to his new home, and being refused that permission, he began this action of habeas corpus to secure the child's possession.

There is evidence, and it is in fact conceded, that the petitioner has at all times properly supported his child; has a deep affection for her, and that he and his second wife are financially and morally qualified to give the child a proper home, education and rearing.

The agreement entered into between the petitioner and the respondents, it will be noted, is not one giving the petitioner's consent to the adoption of his child, and is such an agreement as has many times come before the courts. The overwhelming weight of authority, in considering a contract of this nature which has not been the basis of an adoption actually made by the party with whom the parent has made the agreement, is that such a contract is void as against public policy. In line with these decisions, this court itself has said,

Dec. 1921]

Opinion Per MACKINTOSH, J.

in *Delle v. Delle*, 112 Wash. 512, 192 Pac. 966, 193 Pac. 569, that:

“The parties could not, by contract, and the court could not, in an original decree, make a provision relating to the custody of the children which would be controlling upon a subsequent hearing where their custody was involved.”

The interests of the child being of so great importance, no parent can, by contract, make its custody a matter of bargain and sale.

The contract being void, the case resolves itself into a consideration of what is best for the welfare of the child. Although it may be admitted that the respondents are people of the highest character, and that they are deeply attached to this little girl, there must be weighed in the balances against this situation the rights which the father has to his own flesh and blood, and the evidence being satisfactory of his ability and willingness and qualification, there exists no reason why he should not perform those duties and experience those pleasures which are the natural circumstances of parenthood.

The petitioner is entitled to his legal and moral right to the care, custody, control and association of this little one. The judgment denying the application for a writ of habeas corpus is reversed.

PARKER, C. J., MAIN, and HOVEY, JJ., concur.

HOLCOMB, J., concurs in the result.

[No. 16739. Department Two. December 9, 1921.]

ESTHER SWANSON, *Respondent*, v. PUGET SOUND
ELECTRIC RAILWAY, *Appellant*.¹

RAILROADS (61, 71)—ACCIDENT AT CROSSING—NEGLIGENCE—FAILURE TO SIGNAL—EVIDENCE—SUFFICIENCY. In an action for the death of one driving an automobile across the track of an electric railway, the negligence of the defendant was a question for the jury where the evidence showed the train approached the crossing at a speed of fifty-five miles an hour; that it sounded no whistle; that the automatic electric signal failed to ring or show a red light; that no watchman was kept at the crossing; and that the view in the direction of the approaching train was obscured by a shelter house of defendant and a large pole and sign.

SAME (64, 71)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of one killed by an interurban railway train at a village crossing was for the jury where the evidence showed that the deceased brought his automobile to a standstill within five to eight feet of the track, then started up and was struck while crossing the track by the train running at a speed of fifty-five miles per hour; that the headlight of the train could have been seen for a distance of from 2,000 to 3,000 feet; that in the absence of any crossing signal the deceased might have assumed the headlight as that on the train of another railway; and that from his position a view of the approaching train was obscured by intervening obstructions.

DEATH (37)—DAMAGES—EXCESSIVE VERDICT. A verdict for \$12,000 for negligently causing the death of a man thirty-nine years of age, having a wife but no children, cannot be said to be excessive, where he was capable of earning \$300 per month during the war period.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 14, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant.

Fred H. Lysons, *L. B. Schwellenbach*, and
Christopher Jacobsen, for respondent.

¹Reported in 202 Pac. 264.

Dec. 1921]

Opinion Per MACKINTOSH, J.

MACKINTOSH, J.—On the dark and cloudy evening of January 14, 1920, Ludvig Swanson was killed by a train running on the appellant's interurban line of railway, at a point where it crosses the public highway at grade, in the little town of Orillia, King county. This action is brought by the widow, as administratrix, to recover damages.

Swanson had lived in the neighborhood of this crossing for some time, and had been in the habit of crossing the appellant's tracks in his automobile twice daily. At the time in question, he was traveling in a Ford car on the highway in an easterly direction, and the interurban train which struck him was going in a southerly direction. The railroad tracks extend north from the crossing in very nearly a straight line for many hundred feet. Parallel to the appellant's tracks, a distance about eighty-three feet easterly, are the tracks of the Chicago, Milwaukee & St. Paul Railway, over which electric trains are operated, and easterly from the Milwaukee line, one hundred and ten and a half feet, lie the parallel tracks of the Northern Pacific railroad. As one approaches the crossing from the west, on his left (that is, the north), in the town of Orillia, there is situated a two-story building, used as a blacksmith's shop, the east wall of which is eighty-five and six-tenths feet west of the west rail of the appellant's tracks. An open space extends between this building to a shelter station of the appellant, the west wall of which is twenty-three feet west of the west rail of the appellant's tracks, so that, in other words, there was an open space of sixty-two and six-tenths feet where an unobstructed view could be had of trains approaching from the north. From the point where the west wall of the shelter station, which is approximately eighty-six feet north of the center of the highway, obstructed the view

to the track, the view of trains southbound was interfered with by the station and by poles and other obstructions, except for a short space. On the south side of the roadway and near the track was a danger signal, placed on a pole, consisting of a swinging arm, bell and red light, which was supposed to be put into operation by a mechanism on the appellant's trains, at a point several hundred feet north of the crossing. To the north of the highway and near the shelter station was a pole, some twelve or fifteen feet high, upon which was a cluster of electric lights. This will give an adequate picture of the situation.

It is claimed that the appellant was guilty of negligence in the following particulars: That it drove the train at an excessive rate of speed; that the shelter station had been placed so close to the tracks as to obstruct the view to the north; that the automatic electric signal was out of order and failed to ring or show a red light; that no watchman or signalman was kept at the crossing, and that a large pole and sign had been placed in such a position as to obstruct the view to the north. The case was tried to a jury, which returned a verdict in favor of the respondent, and the appellant raises, aside from the question as to the amount of the verdict, but one proposition, and that is that the evidence is insufficient, as a matter of law, to show any negligence on the part of the appellant, and that the evidence affirmatively shows, as a matter of law, the contributory negligence of the deceased.

A consideration of the sufficiency of the evidence to show appellant's negligence must be approached with the idea of determining whether there was any evidence from which the jury would be justified in determining negligence. The testimony in the case, as showing respondent's negligence, may be fairly stated as follows:

Dec. 1921]

Opinion Per MACKINTOSH, J.

That Swanson was driving his automobile at a moderate rate of speed, and that, after passing the blacksmith's shop, he brought the automobile to a standstill somewhere from five to eight feet from the track, and that the automobile remained stationary a considerable number of seconds; that he then started up and was hit by the train as he was on the tracks; that the train was being operated at a speed of at least fifty-five miles an hour; and that this speed was not slackened before the impact. The testimony further, although contradicted, would indicate that no crossing signal was given; and, without much contradiction, it appears that the light in the automatic signal was not burning; and, although contradicted, there was evidence that the signal arm and bell thereon were not operating. The testimony indicates that the headlights of the approaching train were burning, and that they could be seen for a distance of some 2,000 or 3,000 feet in advance of the train. There was also some testimony that this light might become blended with the headlights of an automobile approaching at right angles, and also with the light emitted from the cluster lamps near the track north of the highway. It cannot be said, as a matter of law, that these facts do not show negligence on the appellant's part. The jury was warranted in concluding from the evidence that the warning lights and bells on the automatic signal were not working; that the view was obstructed by the shelter station; that the approach of the train had not been heralded by a whistle, the establishment of any of which facts, to its satisfaction, would warrant the jury's determination of appellant's negligence.

Passing to the question of whether the evidence establishes, as a matter of law, Swanson's contributing negligence, the argument in favor of such a conclusion

is grounded on the fact that, after he passed the east wall of the blacksmith's shop, he must have perceived the train's approach. Not necessarily so. Although the train at that time may have come within his line of vision, he might, though reasonably careful, have supposed the oncoming light to be that of a Milwaukee railroad train. Further, it could be that, still reasonably careful, he might have recognized the interurban train as such, but have misjudged its rate of speed. More than that, this court cannot say, for it cannot find that the deceased contributed to the accident, as a matter of law, where the evidence discloses, without contradiction (in fact, it is testified to by appellant's own motorman), that the deceased approached the track in a careful manner; that he stopped; that he used some degree of care, at least, in protecting himself against possible injury. Whether that care was that which a reasonable man would have taken under all the circumstances is for the jury to say, and not for this court. More especially is this true by reason of the fact that, at the point where he stopped, he was in close proximity to the automatic signal device, which, according to the testimony in the case, failed to operate, which fact would add confirmation to a belief that it was safe to proceed.

We cannot say, as a matter of law, that, having taken some precaution for his safety, and that, having relied on a signal device which, from his experience, he knew was set in motion by a train far distant north of the crossing, and, if responsive to the train, would have allowed him sufficient time to cross appellant's tracks safely, and which for some reason did not so respond, deceased was contributorily negligent in attempting the crossing. Reasonable minds might well differ in judging decedent's conduct, a fact which precludes our

Dec. 1921]

Opinion Per MACKINTOSH, J.

determining the question as a matter of law. The circumstance that the headlights were visible for a great distance cannot be conclusive against the decedent, for, although he may have seen them as he traversed the open space between the blacksmith's shop and the shelter station, they may have indicated, as we have said, a train approaching on other than appellant's tracks; and, as before noted, when he had stopped, the headlights of appellant's train, the lights from the cluster lamps, and those of his automobile might have become so mingled that a prudent man might reasonably have proceeded.

We are satisfied from a rather careful reading of the statement of facts that there was sufficient evidence of appellant's negligence, and from that reading we can infer no conduct of deceased inconsistent with the acts of a reasonably prudent and careful person in the same situation.

In conclusion, it is urged that the verdict is excessive. The deceased was a man about thirty-nine years of age, who, during the war, had earned \$300 a month in the shipyards; survived by a wife but no children, and while the verdict of \$12,000 seems adequate there is nothing which would prompt us to hold that it is excessive.

Judgment affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16662. Department One. December 9, 1921.]

BLANC'S CAFE, INCORPORATED, *Respondent*, v. J. C.
COREY *et al.*, *Defendants*, UNIVERSITY STREET
IMPROVEMENT COMPANY, *Appellant*.¹

LANDLORD AND TENANT (9)—LEASE—CONDITIONAL DELIVERY OF LEASE. A lease of premises cannot be said to have been conditionally delivered from the fact that the lessee notified the lessor in writing that, in consideration of the delivery of the lease, the lessee would not hold the lessor liable if the present tenants were not out by a given date, but were allowed to remain over a few days longer.

SAME (39-1) — LEASE — ABANDONMENT BY TENANT — WAIVER OF RIGHTS—EVIDENCE—SUFFICIENCY. A lessee who has been prevented from taking possession of leased premises by reason of restrictive clauses in other leases by the lessor cannot be said to have abandoned the lease, or to be chargeable with laches, where it delayed for eight months in bringing a possessory action for the premises and, on the dismissal of its action without prejudice, waited another six months before instituting action, in view of the fact that the lessee refused to receive back the rents and money deposits made by it and retained the keys to the leased premises.

SAME (52)—ACTION FOR FAILURE TO DELIVER POSSESSION—EVIDENCE—ADMISSIBILITY. Evidence of the financial condition of a lessee for the purpose of showing its inability to occupy premises leased to it is immaterial in an action by the lessee for possession.

SAME (52, 53)—ACTION FOR POSSESSION—DAMAGES—RECITALS IN JUDGMENT. The right of a lessee, if any it have, to institute an action for damages, following a possessory action against the lessor for the premises, is fully protected by a recital of the judgment in the possessory action that the question of plaintiff's damages was not presented to or considered by the court.

Cross-appeals from a judgment of the superior court for King county, Ralston, J., entered April 29, 1921, upon findings in favor of the plaintiff, in an action in ejectment, tried to the court. Affirmed.

Ballinger, Battle, Hulbert & Shorts and *Chadwick, McMicken, Ramsey & Rupp*, for appellant.

Wright, Kelleher, Allen & Hilen, for respondent.

¹Reported in 202 Pac. 266.

Dec. 1921]

Opinion Per BRIDGES, J.

BRIDGES, J.—This was an action for the possession of the second floor of a certain building in the city of Seattle. The case was tried by the court without a jury, and the defendant University Street Improvement Company has appealed from a judgment in favor of the plaintiff.

We find the controlling facts to be as follows: On August 18, 1917, appellant, University Street Improvement Company, made and delivered to the respondent, Blanc's Cafe, Incorporated, its written lease covering the second floor of a certain building. This lease, by its terms, was to expire on the 4th day of February, 1923, and the premises were to be used only for restaurant or cafe purposes. At the time of the execution and delivery of the lease to respondent, one Kitchen was in possession of a part of the leased premises by virtue of an unrecorded written lease which, according to its terms, was to expire on September 30, 1918. The respondent's lease did not in any manner mention the Kitchen lease. However, before the respondent's lease was delivered, it addressed a letter to appellant's rental agent wherein it was stated that, in consideration of the delivery of the lease, respondent would not hold the appellant liable "in the event that the present occupants (Kitchen) of those premises are not out by September 1, 1917, and are allowed to remain over a few days longer. Of course, it is understood that you will use every means possible to gain possession by that date, but in the event that the tenants are not out by that date, we herewith agree not to hold you liable." Prior thereto the appellant had made arrangements by means of which Kitchen had agreed to vacate the premises not later than September 15, 1917.

Very shortly after the delivery of the lease to the

respondent, appellant discovered that a lease which it had previously made to a portion of the ground floor of the same building to Wells and Skarlatos contained a provision that no part of the building, during the life of the lease, should be let to any person for restaurant or cafe purposes. The Wells and Skarlatos lease was to expire on March 1, 1919, but contained a clause providing for two years' extension. Apparently, at the time of making respondent's lease, appellant had forgotten that the Wells and Skarlatos lease prohibited any other restaurant or cafe in the building. It at once informed respondent of the restrictive clause in the Wells and Skarlatos lease, and it was agreed between the parties that appellant should make an effort to in some way reconcile Wells and Skarlatos to respondent's lease. Being unable to accomplish anything in this direction, the appellant, on August 30, 1917, informed respondent that it would be unable to live up to the terms of the lease to it, and at the same time tendered back to respondent such deposits and rent money as it had at that time paid. These tenders were refused. Finding itself in the situation outlined, the appellant made no further effort to procure Kitchen to vacate the premises occupied by him.

In April, 1918, respondent brought suit against appellant and Kitchen for possession of the leased premises. The answer of the defendant Kitchen disclosed that his lease did not expire until December, 1918. Thereupon respondent voluntarily dismissed its suit without prejudice to further action. After the Kitchen lease had expired, and in December, 1918, respondent brought this suit for possession. At the first trial it was nonsuited and judgment of dismissal was entered. From that judgment it appealed to this court, which reversed the judgment of dismissal and returned the

Dec. 1921]

Opinion Per BRIDGES, J.

case for trial. *Blanc's Cafe v. Corey*, 110 Wash. 242, 188 Pac. 759. Before the trial of the case, all of the defendants except the appellant filed disclaimers. At the time of the trial, the Wells and Skarlatos lease had expired.

Appellant's first point is that the lease to respondent was conditionally delivered, that is to say, it was delivered on condition that Kitchen would vacate the premises occupied by him. We do not think there is any merit in this contention. It is based largely upon the letter above quoted, written by the respondent to appellant's rental agent. In the first place, respondent's letter cannot be construed as a conditional delivery of the lease. It amounts to nothing more than an agreement on its part not to hold the appellant in damages simply because Kitchen may not vacate the premises at the exact time therein mentioned. It is plain that, at the time respondent's lease was made and delivered, it was understood between it and the appellant that the latter already had some arrangements or could make some arrangements with Kitchen for the vacation of the premises occupied by him, and it was contemplated that there would be some little delay in accomplishing this vacation. The sole purpose of the letter was to relieve appellant from any liability during the short period during which it was contemplated Kitchen would occupy the building after September 1st. Besides, this action was not brought until after the Kitchen lease had expired, and presumably he had moved from the premises. We hold that the respondent's lease was delivered to it unconditionally.

It is next contended by appellant that respondent has so conducted itself as that it either abandoned the lease or considered it terminated, or is estopped to

now claim any rights under it. It bases its argument largely on the facts that within a month after the delivery of the lease it informed respondent that it would be unable to carry out the lease on account of the restrictive clauses of the Wells and Skarlatos lease, and that respondent did not then insist upon its rights under the lease, but discussed with appellant ways and means to avoid the objections being made by Wells and Skarlatos, and for a time considered certain propositions made by the appellant concerning other buildings in which respondent might do business, and that the latter did not take any action to indicate that it was insisting upon its lease until it brought the first action in April, 1918, and that, after its first action was dismissed in June, 1918, it took no other steps to enforce its rights until this action was commenced in December, 1918. We cannot agree that such conduct on the part of respondent amounted to an abandonment of the lease or an estoppel to claim any rights thereunder. We do not find from the testimony that at any time the respondent, either expressly or by necessary implication by word or act, led the appellant to believe that it would not insist upon its lease. The mere fact that it advised with appellants concerning the Wells and Skarlatos lease, and that it did not bring its suit for some six months after appellant had said it could not live up to the terms of the lease, would certainly not have any reasonable bearing on the proposition of abandonment or laches. The fact that respondent refused to receive back the rents and money deposits made by it; the fact that it still retained the keys to the leased premises; the fact that it brought its first suit within some six or eight months after appellant had asserted it could not give possession, and the fact that it brought its second suit within some six months

Dec. 1921]

Opinion Per BRIDGES, J.

after the dismissal of the first action, would be amply sufficient to deny any intention upon its part to abandon or waive its rights under the lease.

The appellant was probably unfortunate in making the lease to the respondent without protecting itself against the previous lease, but this cannot be any reason why respondent should not try to enforce its rights under its lease. It seems to us that no extended argument is necessary upon this question. A recital of the facts themselves would seem to show that appellant has wholly failed to prove laches or abandonment by the respondent.

The appellant offered to prove that the respondent does not maintain this action in good faith, and that because of its financial embarrassment it would be wholly unable to go into possession of the leased premises, even though the same were tendered to it by the appellant. We think the trial court was right in rejecting this class of testimony. The respondent had its rights, if any, under the lease, and by the terms of that instrument it was manifestly entitled to possession of the leased premises. Under these circumstances, its financial condition could not be material.

The respondent has cross-appealed and insists that this was purely a possessory action and in no manner one for damages, and that the judgment of the trial court should have recited that fact, so as to reserve to respondent any right of action which it might have against the appellant for damages on account of being deprived of the leased premises for a long period. Respondent argues quite extensively that it is entitled, if it so chooses, to maintain an independent and separate action for such damages. We do not find it necessary to decide whether it can maintain such action. Assuming that it can, then we have no doubt that the

judgment of the court is amply sufficient to protect it in this regard, for it recites that "the question of plaintiff's damages, if any, was not presented to or considered by the court." The judgment is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16022. Department One. December 10, 1921.]

GROWERS & PRODUCERS COMPANY OF CALIFORNIA, *Appellant*, v. G. W. FISCHER, *Respondent*, JAS. F. MACDONALD *et al.*, *Defendants*.¹

PRINCIPAL AND AGENT (9, 36½, 42)—RELATION—AUTHORITY OF AGENT—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—EVIDENCE—SUFFICIENCY. One not bound on the face of a written obligation cannot be chargeable with liability thereon in the absence of a showing that it was executed for and on his behalf by some person authorized by him to so execute it.

Appeal from a judgment of the superior court for King county, Hall, J., entered November 6, 1919, upon findings in favor of the defendant, in an action on a promissory note, tried to the court. Affirmed.

Shank, Belt & Fairbrook, for appellant.

Bausman, Oldham, Bullitt & Eggerman and *Walter L. Nossaman*, for respondent.

FULLERTON, J.—In this action the appellant, The Growers & Producers Company of California, seeks to recover from the respondent, G. W. Fischer, the sum of \$48,960.70, with interest, alleging the same to be due upon a promissory note bearing the signature, as payor, of one James F. Macdonald. In the complaint as filed, G. W. Fischer, James F. Macdonald, L. F.

¹Reported in 202 Pac. 252.

Dec. 1921]

Opinion Per FULLERTON, J.

Macdonald, A. R. Udall and Charles G. Heifner are named as defendants and charged with liability, but the respondent was alone served with process and he alone defended. After issue joined, the action was tried by the court sitting without a jury, and resulted in a judgment in favor of the respondent.

To an understanding of the controversy, it is necessary to detail the facts somewhat at length. The appellant is a real estate firm doing business in the city of San Francisco, California. In the summer of 1915, it procured an option to purchase, for the sum of \$137,500, a tract of land, containing some five thousand acres, situated near Corning, in Tehama county, California, paying \$5,000 for the option; the tract being commonly known as the Howell Ranch. At that time the company had in its employ James F. Macdonald and A. R. Udall as salesmen, Udall being also a stockholder in, and secretary of, the appellant corporation. These parties became acquainted with the land through their connection with the appellant, and conceived the idea of organizing a company for its purchase and of developing it into an orange grove. They first interested in the scheme L. F. Macdonald, who is a brother of James F. Macdonald. The Macdonalds and Udall are residents of California, and the Macdonalds are nephews of the respondent Fischer and of one F. T. Fischer, who are residents of Seattle, Washington. The Macdonalds believed that their uncles could be interested in the scheme, and Udall and L. F. Macdonald visited them at Seattle for that purpose. They made known to the respondent the terms on which the property could be purchased from the appellant, gave him a description of the property, and informed him of their belief that the land was suitable for orange culture, and so far interested him in it as

to induce him to visit the land. The respondent, however, then informed them that he thought it unwise to obligate themselves to purchase the property, but believed from their statements that it was of greater value than the price asked for it and that it could be sold for a greater price if it were brought to the attention of the proper parties. This was in the summer of 1915, and the respondent visited the property late in July of that year. On visiting the property he became confirmed in his belief, and on August 20 of the same year an option to purchase the land at a price of \$175,000, expiring on April 10, 1916, was taken from the appellant. For this option \$5,000 was paid. By an instrument in writing bearing the same date, executed by the respondent, G. W. Fischer, F. T. Fischer, James F. Macdonald, L. F. Macdonald and A. R. Udall, the parties agreed to employ C. G. Heifner to visit the east and attempt to sell the property, agreeing, in case Heifner succeeded in selling the property, to divide the profits equally among themselves, and in case he failed so to do, to equally share the expenses and other losses caused thereby. In this instrument the parties described themselves as partners for the purchase of the Howell Ranch. James F. Macdonald was appointed as the representative of the others and authorized to enter into a contract with Heifner for the purposes mentioned. It was expressly provided that the contract should be for a limited expenditure and that each of the parties would contribute pro rata thereto. Subsequently a contract was entered into with Heifner, and he made an effort to find a purchaser for the land. In this Heifner did not succeed, it finally becoming known that the efforts would result in failure shortly prior to the time the option to purchase entered into with the appellant would expire.

Dec. 1921]

Opinion Per FULLERTON, J.

On the failure of Heifner to sell the property, F. T. Fischer withdrew from the enterprise. The others, however, Heifner joining with them, conceived of a new scheme for its purchase. The scheme as formulated between the parties was in substance this: They agreed to form a corporation, of which they would become officers and trustees; that this corporation when formed should purchase the land from the owner on the terms of the option held by the appellant with the owner, and execute to the appellant its obligations for the difference between the option price payable to the owner and the option price payable to the appellant; that the corporation should enter into a contract with one Ames to plant a certain part of the land to orange trees and to maintain them until they reached a bearing age; that the part of the land so planted should be platted into acreage tracts and immediately put upon the market for sale; that from the sale of these tracts the deferred payments to the owners and the payment of the obligation to the appellant should be made.

On attempting to carry the understanding into execution, it was found that the formation of the contemplated corporation would take considerable time and that the exigencies of the situation could not await that event. There were payments agreed to be made to the owner of the property which were about to become due upon the appellant's contract with it, and Ames must begin his work at once if an entire year was not to be lost in starting the orange grove. Moreover, Ames refused to take the obligation of the corporation for his services unless it was guaranteed by the individuals. To meet these exigencies the parties agreed to advance for the purpose the sum of ten thousand dollars each; that title to the property should be taken in the name of James F. Macdonald, who should exe-

cute in his own name the necessary obligations to the owner and to the appellant to procure the legal title; that the formation of the corporation should be proceeded with, and when it was so formed, title to the property should be conveyed to it by Macdonald, whereupon it would assume the obligations; and that the parties would enter into an individual contract with Ames for the planting of the orange grove.

This plan was carried out. The advancements agreed upon were made by the parties; the land was purchased from the owner and a deed taken in the name of James F. Macdonald; Macdonald executed to the owner his obligations for the deferred payments, securing the same by a trust deed to the property, executing at the same time the obligation to the appellant which is the subject of this action, securing it likewise by a trust deed; the agreement with Ames was executed; the corporation was formed and the property conveyed to it by Macdonald; and the corporation assumed the obligations, both to the owner and the appellant, incurred by Macdonald. The enterprise, however, subsequently failed, and the land reverted to the owner in virtue of the conditions of the trust deed.

The principal controversy between the parties is over the question, for whom was Macdonald acting when he took, in his own name, a deed to the property, and in his own name executed the obligation sued upon. It is the appellant's contention that he was acting for and on behalf of himself and his associates; that he was the agent and trustee of his associates, authorized by them to take the deed and execute the necessary obligations on their behalf, and, in consequence, his promise is their promise. On the other hand, it is the respondent's contention that Macdonald

Dec. 1921]

Opinion Per FULLERTON, J.

was acting for and on behalf of the corporation which they intended to form and which they subsequently did form.

Since the respondent did not sign the obligation sued upon, he is, of course, not bound upon the face of the instrument. If he is to be held at all, it is because of the nature of the transaction; because the obligation was executed for and on his behalf by his duly authorized agent. Aside from the evidence on the matters related, the evidence of the parties is flatly contradictory. On the one side it is testified that the scheme by which the property was purchased was entirely that of Macdonald and his associates, with which the appellant had nothing to do, acquiescing therein after it had been fully formulated; while on the other side it is testified that the agents and representatives of the appellants were present and participated in all of the conferences leading up to the purchase; that they fully understood the purposes of Macdonald and his associates not to bind themselves individually, and accepted the obligation on behalf of their principal with that understanding. Generally, it can be said that the evidence of each side supports the contention of that side, and were there no other circumstances, there might be difficulty in determining on which side the evidence preponderated.

But there are certain circumstances which seem to us to turn the scale in favor of the respondent. The first and foremost of these is the fact that the respondent did not either execute the obligation nor sign any writing authorizing Macdonald to execute the obligation for him. The matter was of considerable moment. To many the amount involved would appear a considerable fortune, and it is not shown that to the appellant it was an idle or inconsequential matter. If

the agreement was as the appellant contends, the natural and usual course of business would have been to express the agreement in writing and not let it rest in the uncertainties of parol. It is not a case of an agent dealing for an undisclosed principal. The principals were known, and not only known but personally present and taking part in the negotiations leading up to the transaction which resulted in the execution of the obligation. The men engaged in the transaction were not novices. On the contrary, they were all men of experience and had competent legal advice. Men unused to business transactions and unacquainted with the disagreements that usually arise over oral contracts, sometimes leave matters of moment to themselves to rest in parol; but this is not the rule with men used to business affairs, especially where the agreement is to pay money, and where they have in consultation a competent legal advisor. Indeed, among novices, contracts of this sort are usually in writing, and it is hard to suppose that, if the intent here was as now contended by the appellant, it would not have been expressed in writing. If it be true, as suggested in explanation, that the time was not then ripe for the execution of the instrument, that the parties lived at separate places some distances apart, and that it would have caused delay and inconvenience to send the instrument to each of them severally for signature when the time became so ripe, it does not explain why there was not then a written authorization given Macdonald to execute the instrument. This form of authorization would have been as effectual to bind the parties as would have been their signatures on the instrument itself, and no reason is suggested why such an instrument was not then executed. The failure to put the authorization in writing ap-

Dec. 1921]

Opinion Per FULLERTON, J.

pears more strange also when it is remembered that, in the other instances where the parties agreed that one of their number might bind the others to an obligation, the agreement was expressed in writing. It was so in the first instance, where an endeavor was made to find a purchaser for the property through the agency of Heifner, and in the agreement with Ames the guaranty was signed by the parties individually, and not by Macdonald either in his own name as an individual, or in his name as the agent or trustee for the others.

Another circumstance is that the deed to the property was taken in the name of Macdonald as an individual. This is consistent with the idea that he was but a temporary custodian of the property, holding it for the purpose of conveying it to a corporation thereafter to be formed, but is inconsistent with the idea that he was a purchaser on his own behalf and on behalf of individuals competent and capable of receiving and holding title. Seemingly, if it were the understanding that they were purchasers obligated to pay the purchase price, the natural and obvious thing would have been to name them as grantees, so that their interests might be definitely known.

Still another circumstance is that the agreement was carried out in accordance with the respondent's version, and that in the corporation formed in pursuance thereof two of the officers of the appellant corporation became trustees. True, one of them asserts that his name was inserted in the corporate articles without his knowledge or consent, but it is of some significance that this officer afterwards joined with the respondent and his associates in the formation of a subsidiary corporation the purpose of which was to exploit and sell the tracts into which the orange grove planted upon the premises was subdivided.

The legal questions involved require no extended consideration. Since the respondent was not bound upon the face of the obligation, it must be shown, before he is charged, that it was executed for and on his behalf by some person authorized to so execute it. It is our opinion that the record does not justify this conclusion.

The judgment of the trial court will therefore stand affirmed.

PARKER, C. J., HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16323. *En Banc*. December 12, 1921.]

OLAF OLSON, *Respondent*, v. BUSY BEE MINING AND
DEVELOPMENT COMPANY, *Appellant*.¹

MINES AND MINERALS (20)—MECHANICS' LIENS (24)—RIGHT TO LIEN—OWNERSHIP AND CONSENT BY OWNER—STATUTES. One employed to construct a tunnel in a mining claim cannot enforce a lien for his labor, as authorized by Rem. Code, § 1129, where the tunnel is driven upon the property of another than his employer.

MECHANICS' LIENS (26)—CONSENT OF OWNER—LESSEE AS AGENT OF OWNER. Conceding, without deciding, that the lessee of a mining claim is the statutory agent of the owner, the lessee would have no authority under the mechanics' lien law to procure one to furnish labor or material on the land of a stranger.

SAME (24, 28)—CONSENT OF OWNER—CONTRACT WITH LESSEE—ESTOPPEL. The owner of a mining claim is not estopped to deny the right of one employed by the lessee to drive a tunnel to assert a mechanics' lien on the property, though having knowledge the work was in progress, where the owner did not know at what angle or in what direction it would be constructed, nor that it would be driven on the land of another.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered June 21, 1920, in

¹Reported in 202 Pac. 246.

Dec. 1921]

Opinion Per MITCHELL, J.

favor of the plaintiff, in an action to foreclose a mechanics' lien, tried to the court. Reversed.

Preble, McAulay & Meigs, for appellant.

Parker, LaBerge & Parker, for respondent.

MITCHELL, J.—The Busy Bee Mining and Development Company, a corporation, is the owner of eighty acres of coal-bearing lands in Kittitas county. One slope, about six hundred feet in length, had been driven down, tapping a vein from which a small amount of coal had been taken out. On October 8, 1917, the owner, in writing, let the premises for a term ending on or before March 29, 1931, to William J. Gallaher and Gardner J. Gwinn, to be operated as a coal mine. On February 16, 1918, the lessees, by a written instrument, assigned their interests under the lease to Gwinn and Gallaher, a corporation, that commenced and thereafter operated the mine. On August 30, 1918, Gwinn and Gallaher, a corporation, entered into a written contract with Olaf Olson by which the latter agreed to drive a six-by-six tunnel or air slope from the bottom of the mine at a point to be directed by Gwinn and Gallaher, incorporated, pursuant to which Olson commenced the performance of the work on September 13, 1918, and continued thereat until December 7, 1918. The air slope was not completed for the reason that about December 7, 1918, Gwinn and Gallaher, a corporation, became and continued to be insolvent and were placed in the hands of a receiver, and all mining operations were closed. Olson, not having been paid for his labor, duly filed and had recorded his notice of claim of mechanics' lien on the eighty acres. This action was brought to foreclose the lien. There was judgment for the plaintiff, from which the defendant, the owner of the property, has appealed.

A number of assignments of error have been presented and elaborately argued. With one exception, we find it unnecessary to discuss them. In all other respects we may assume, without deciding, that, under the particulars of this case, the respondent would be entitled to judgment. The one feature of the case fatal to the right of the respondent to recover is that the air slope or tunnel as constructed, or rather to the extent it has been constructed, is almost wholly upon property that does not belong to the appellant, the owner of which other property has in no way given his consent, nor indeed does it appear that he was aware that the tunnel had been constructed upon his property.

The statute, § 1129, Rem. Code (P. C. § 9705), provides: "Every person performing labor upon . . . the construction, alteration or repair of any mining claim . . . has a lien upon the same for the labor performed . . ." The whole theory of the statute in providing that the claim of a mechanic may be made to attach to the land is based on the equity of paying for work on the land that benefits it. It contemplates the appropriation and use by the landowner of the mechanic's labor upon the land of the owner. The statute says so in positive terms. It says that every person performing labor *upon* any mining claim, etc., has a lien, and here the evidence fails to show if the small portion of the air slope or tunnel as constructed that is upon appellant's property can be made of any benefit to it.

Respondent attempts to meet the situation by contending that he knew nothing about the boundary lines and that he constructed the tunnel at the place and as directed by the lessee, who was the statutory agent of the appellant. If it be admitted that in this

Dec. 1921]

Opinion Per MITCHELL, J.

case the lessee was the statutory agent of the owner of the fee, under the mechanics' lien law (which we do not decide), there is nothing in the statute that even attempts to authorize a lessee, or any one on behalf of the owner, to procure one to furnish labor or to furnish material on the land of a stranger.

It is further argued by the respondent that the officers of the appellant were at the mine during the performance of the work, and that the appellant is therefore estopped from denying the effectiveness of the lien. The facts relied on are: (1) an officer of the appellant was at the mine, so respondent says, just as he "was going to start getting the machinery ready", and wanted to know how long respondent thought it would take to construct the tunnel; (2) two officers of the appellant corporation were at the mine a few days before respondent quit work, to collect royalties as to which the operators were delinquent, and the respondent mentioned the fact that he was engaged in making the air slope or tunnel; and (3) some time about, possibly before, the date of the contract with the respondent, Mr. Gwinn of the lessee corporation claims to have talked with the president of the appellant, not at the mine, about the construction of the tunnel. This latter is denied by the president of the appellant, who testified that the conversation was only with reference to requested changes in the lease. It is certain, however, that there is no proof appellant was ever advised of the terms of the contract of the lessee with the respondent as to the location of the air slope, or otherwise, or that it ever knew at what angle or direction the air slope would be constructed, or that it, or any part of it, would be driven in the land of another.

Respondent's claim is based upon work performed under and according to a contract with a party other

than the appellant. He was carrying out that contract as directed by the party with whom he had made it. He was in no way misled or influenced by the conduct of the appellant, which, through its officers, was neither made aware of nor had it any reason to know or believe that the work being done by the respondent was or was intended to be located almost entirely upon the property of a third person.

We conclude the respondent is not entitled to recover. The judgment is reversed with directions to dismiss the action.

PARKER, C. J., HOVEY, FULLERTON, MAIN, TOLMAN, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16692. Department One. December 12, 1921.]

REEVES AYLMORE, JR., *Respondent*, v. ERNEST L.
BICKFORD *et al.*, *Appellants*, JAMES F. LANE
et al., *Defendants*, SINE I. TENNANT
et al., *Respondents*.¹

COVENANTS (11)—RUNNING WITH LAND—WATER CONTRACT—CONSTRUCTION. Where owners of land on which springs were located, who had collected and stored the water for domestic use, entered into an agreement with the owner of lands over which the waters of the springs had been accustomed to flow, stipulating that the latter should be permitted to tap their pipe and take one-third of the water in consideration of his grant to such appropriators of all his right, title and interest in the waters of such springs, the agreement did not constitute a covenant running with the land.

WATERS AND WATER COURSES (67, 68)—CONVEYANCES—WATER CONTRACT—RIGHTS AND LIABILITIES OF PARTIES. The owner of lands who has a water contract providing for service of water to himself is under no obligation to provide water service to purchasers of subdivisions of his land, where the contracts do not so provide; nor is a purchaser of a tract entitled to the use of the pipe line with-

¹Reported in 202 Pac. 249.

Dec. 1921]

Opinion Per MITCHELL, J.

out the owner's consent, where the pipe was laid after sale to such purchaser in such a manner as to clearly indicate the owner's dominion and control over it.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 21, 1921, in favor of the plaintiff and certain defendants, in an action for equitable relief, tried to the court. Reversed.

Robert A. Devers, for appellants.

Gill, Hoyt & Frye, for respondents.

MITCHELL, J.—Prior to December, 1905, James F. Lane and John P. Hoyt appropriated to their own use the waters of a spring, or a number of springs, originating on block 4 of White and Noble's Addition to East Seattle. James F. Lane and wife owned twenty-five lots of block 4, upon which lots the springs were situated, and alone or with the Hoyts owned block 3 of the same addition. John P. Hoyt and wife owned real property adjacent to that belonging to Lane, which was subject to, or conveniently located with reference to, the flow of the water from the springs. Together they had constructed a storage tank near the springs and had piped the water to their several properties. Arthur F. Bickford and Ernest L. Bickford were the owners of nearly all of J. T. Forrest's First Addition to East Seattle, and had not the waters of the spring been diverted they would have flowed over and across the Bickford property, but not over that portion of it subsequently acquired by Reeves Aylmore, Jr., plaintiff. As a matter of amicable adjustment of any question that might otherwise arise in regard to the use of the water, James F. Lane and wife, as parties of the first part, and John P. Hoyt and wife, as parties of the second part, and Ernest L. Bickford and wife with Arthur F. Bickford and wife, as parties of the third

part, entered into a written contract (hereinafter spoken of as the water contract) on December 29, 1905, concerning the storage and use of the water. The contract provided that, whereas the first and second parties had appropriated the waters to their own use for domestic and irrigation purposes, and had erected a storage tank on block 4 wherefrom the water had been piped to their properties, at an expense of \$350; and whereas the parties of the third part, through whose lands the rivulet or stream flowed in its natural course before it was appropriated, desired to tap the water pipe of the first and second parties for the taking of water therefrom for domestic and irrigation purposes, and which was agreeable to the first and second parties, the water to be so taken, however, not to exceed one-third of the flow in the pipe, it was agreed:

“That the said parties of the first and second parts will allow the said parties of the third part to tap their said pipe at some point on said block three and will and do hereby grant and convey to said parties of the third part, their heirs and assigns, the right to so tap said pipe and take therefrom, at the place where so tapped for the uses and purposes hereinbefore mentioned, not to exceed one-third of the water flowing therein;

“And said parties of the third part in consideration of the covenants and agreements on the part of the parties of the first and second parts, do hereby agree to and do hereby grant and convey unto the said parties of the first and second parts, their heirs and assigns, all of the right, title and interest of the said parties of the third part which they have had or may have to the waters of said spring or rivulet and the use thereof by reason of the fact that if not appropriated, as hereinbefore stated, it would have flowed in its natural state across J. T. Forrest's First Addition to East Seattle owned by said parties of the third part,

Dec. 1921]

Opinion Per MITCHELL, J.

or otherwise, it being the intent of all parties hereto to adjust by this agreement, any and all claims which they or either of them may have had or may have to the waters of said spring or rivulet and the use thereof where it has been appropriated as hereinbefore stated, or elsewhere, and to respectively give, grant and convey to each other the right to appropriate, divert and use the said waters equally for the purposes hereinbefore specified; that is to say, to the parties of the first part one-third thereof, to the parties of the second part one-third thereof, and this indenture is and is to be taken as a full and complete conveyance, each to the other, of any and all rights of each and all parties hereto to said waters and to the use thereof for the accomplishment of the purposes herein set out.”

It was further agreed that the parties of the third part should pay \$116.67 as their one-third of the cost of the construction of the works as they then existed, and that the tapping of the water pipe should be done in a workmanlike manner, from which point the distributing pipe of the third party across block 3 to reach the J. T. Forrest First Addition should be placed deep enough not to interfere with the ploughing and cultivating of the ground. It was also agreed that the expense of maintenance, and of additions agreed upon, down to the point where the two-inch pipe should be tapped, should be borne and shared equally by the parties, and that the parties should not make use of their respective shares of the water except for the purposes mentioned and upon the designated properties of the parties. It was further agreed that the third parties might, instead of tapping the pipe, take their share of the water at the intake on block 4 and from thence conduct it to a tank to be erected by the third parties on their own property, in which event, and if parties of the third part do not exercise their right to tap the two-inch pipe at some point on block 3, the

parties of the third part shall be relieved from paying the sum of \$116.67 mentioned and shall be relieved from paying any of the expenses of maintenance, but not relieved from their share of expense incident to any improvement agreed upon by the parties for the purpose of improving the waters or flow thereof to the point at which it may be used for the benefit of the parties. The concluding paragraph of the contract is as follows:

“It is further mutually expressly covenanted and agreed that this indenture is and shall be of full force and effect and binding upon each and all of the parties hereto, and their and each of their heirs, executors, administrators and assigns, and shall be taken and considered as and shall be covenants and agreements running with the land and binding upon the grantees respectively of the above named parties and each of them, as the owners of each and all of the land hereinbefore described respectively.”

The contract was recorded in the county auditor's office and afterwards James F. Lane and John P. Hoyt acquired another lot in block 4 upon which there is a spring, and they and the Bickfords purchased nine other lots or parcels of land near the spring as a precaution against contamination of the water. After the date of the water contract, the Bickfords occupied their property in Forrest's First Addition as a home. For their water supply they laid, at their own expense, a water pipe from the intake at the springs to two barrels, used for storing the water, on their own premises, and thence to their residence. Some time after the date of the water contract a large water tank was erected near the old one, and shortly the old one fell into disuse and decay. A replat of Forrest's First Addition was made and filed, designating the property as tracts 1 to 10. Tracts 3 to 10, of different sizes from a small area to four acres, were owned by the Bickfords. By a statutory warranty deed dated October 5,

Dec. 1921]

Opinion Per MITCHELL, J.

1910, delivered shortly thereafter, tract 5 of the replat was conveyed to Reeves Aylmore, Jr., on which he built a residence, completing it about May, 1911. It has been his residence since that time.

About December, 1910, or January, 1911, and after the sale of tract 5, the Bickfords changed the plan of bringing water to their lands. They connected a two-inch water pipe with the large tank, installing a shut-off at that place, laid the pipe across the lands of James F. Lane and John P. Hoyt and thence to the Bickford residence, and then on to a public road which crosses the replatted property, and along the highway to the property line of tract 5, putting in a shut-off. During the building operations on tract 5, a private service pipe was connected at the property line, which has at all times since been used to supply that tract with water. Subsequent to the sale of tract 5, other tracts were sold and conveyed by warranty deeds, direct or intermediate from the Bickfords, to defendants Sine I. Tennant, S. H. McElfactrick and wife, and Perie A. Ament and husband, each of whose tract was supplied, when needed, with water in the same manner by extending the pipe to the property line and putting in a shut-off. The defendants Tennant, McElfactrick and Ament have paid water rent, being cautious, on purchasing their properties, in agreeing with the grantors that water should be delivered in the manner it has been for a consideration. It seems to have been understood that the plaintiff should not pay anything for his use of water the first year. Thereafter, for two or three years, he paid an annual charge made by Bickford, and then for two or three years he refused, as he testified, to pay anything as water rent, while Bickford testified his understanding was that payments were re-

fused because Reeves Aylmore, Jr., claimed he had been compelled on two or more occasions to assist in cleaning out or repairing the intake, ditch or water tank during the absence of Bickford. Again from July, 1917, until after November, 1919, Bickford was absent from the state, and upon his return and demand that Reeves Aylmore, Jr., pay water rent, which was refused, he threatened to remove the water pipe and discontinue the service to his property. This suit was then brought by Reeves Aylmore, Jr., against the Bickfords and their wives, John P. Hoyt (his wife having lately died), Sine I. Tennant, S. H. McElfactrick and wife and the Aments.

Upon the trial a judgment was entered in favor of the plaintiff and defendants Sine I. Tennant, S. H. McElfactrick and wife and Perie A. Ament and husband, that each was the owner of his respective tract in the replat of Forrest's First Addition and entitled to the undisturbed use of the water flowing from the spring located on block 4 of White and Noble's First Addition to Seattle, through the pipe laid to the tract of each, in the proportion that it bears to all the land in J. T. Forrest's First Addition, coupled with the obligation on the part of each tract owner to pay to James F. Lane and John P. Hoyt the proportionate share for the upkeep and expense incident to the maintenance of the water plant located on block 4 and the making of any additions thereto which may be agreed upon by the parties in interest, and to pay defendant E. L. Bickford each his proportional share of the installation and upkeep of the said Bickford's system after said water is diverted. The Bickfords were enjoined from interfering with the flow of the water to the premises of the owners of the tracts. The Bickfords and John P. Hoyt have appealed.

Dec. 1921]

Opinion Per MITCHELL, J.

It appears that, about the year 1910, Arthur F. Bickford and wife succeeded, by conveyance, to the interest of Ernest L. Bickford and wife to all of the property they owned in J. T. Forrest's First Addition, and that James F. Lane and John P. Hoyt have been punctually paid by Mr. Bickford one-third of all expenses for maintenance of the works and costs of improvement, and, also, of the lots purchased to protect the springs, according to the terms of the water contract. There has been no controversy between the parties signing the water contract.

In their brief respondents say: "The case hinges entirely upon this question—is the agreement entered into between J. F. Lane, John P. Hoyt and Ernest L. Bickford (the Bickfords) one known as a covenant running with the land?" There is nothing in the water contract that amounts to a covenant running with the land, or at all, with reference to the water, by which James F. Lane and wife and John P. Hoyt and wife agreed to deliver water at the lines of the properties now owned by the respondents. As to the point of delivery of the water, they simply agreed that the Bickfords might take one-third of it from the intake at the springs, or by tapping the water pipe on the lands of James F. Lane and John P. Hoyt, with the right in either event to cross their lands for the purpose of reaching the lands of the Bickfords. Neither is there anything in the terms of the water contract that amounts to a covenant running with the land, or at all, with reference to the water, by which the Bickfords agree or are obligated to deliver any of the water to anyone at any place at any time. They were granted the right and privilege of receiving from the intake at the springs, or at another place on the lands of James F. Lane and John P. Hoyt, one-third of the

water. None of the parties signing the water contract bound himself to deliver any water at the lines of the properties of the respondents.

Rather than as suggested by the respondents, the question in the case is: Are the Bickfords, or either of them, under obligations to deliver water at the properties of the respondents? It has been seen that the water contract does not provide for the service. There is nothing in the deeds of conveyance to the respondents which requires it. Respondents Sine I. Tennant, S. H. McElfactrick and wife and the Aments have been receiving the service by independent agreements, and the courts are without power to make new ones for them. Nor is the respondent Reeves Aylmore, Jr., entitled to the use of the pipe line without the consent of Mr. Bickford, the owner of it, who laid and constructed it, after the sale of tract 5 to the respondent, in such a manner as to clearly indicate his dominion and control over it. Some contention is made on behalf of the respondent Reeves Aylmore, Jr., because of the fact that in making his purchase he was furnished an abstract of title showing the water agreement which had been recorded. As a representation it amounted only to saying the water contract was existing and outstanding, and cannot be considered as a representation, or inducement for the belief, that thereafter his grantor would or should construct and maintain at his own expense a line of water pipe to tract 5, for there was no such provision or obligation defined in that contract.

Unaided by any findings of fact by the trial court, an examination of the record in this case leads to the conclusion that the judgment is erroneous. The judgment is reversed, and the cause remanded with directions to set aside the injunction and dismiss the action.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

Dec. 1921]

Opinion Per TOLMAN, J.

[No. 16624. Department One. December 12, 1921.]

THOMAS IRVING, *Respondent*, v. D. E. FERGUSON,
Appellant.¹

OFFICERS (18) — EXTENT OF TERM — STATUTES — CONSTRUCTION. Rem. 1915 Code, § 4910-10, and Laws 1919, p. 475, § 23, providing for the appointment of voting machine custodians temporarily for election purposes, and for the appointment of a "permanent" employee as custodian in case any county or city shall own two hundred or more machines, does not contemplate the appointment of a custodian to hold for life or during good behavior, such term being used solely to distinguish between the two classes of custodians, and hence such "permanent" custodian is removable at the pleasure of the appointing power.

Appeal from a judgment of the superior court for King county, French, J., entered June 13, 1921, in favor of the plaintiff, in an action for an injunction, tried to the court. Reversed.

Malcolm Douglas, Arthur Schramm, Jr., and R. L. Bartling, for appellant.

Robert H. Evans, for respondent.

TOLMAN, J.—Respondent brought this action seeking an injunction restraining the appellant, as county auditor of King county, from discharging respondent from the office of chief custodian of voting machines of King county. Upon the filing of the complaint, a show cause order issued. Appellant appeared and demurred, and, without ruling on the demurrer, and after argument of counsel, on the return day of the show cause order, an injunction *pendente lite* was issued, and this appeal followed.

It appears from respondent's complaint and his affidavit filed therewith, that King county has two hundred or more voting machines, and is authorized by § 23,

¹Reported in 202 Pac. 269.

ch. 163, Laws of 1919, p. 475, to employ a chief custodian of voting machines; that respondent was appointed to that position in June, 1919, gave a bond as required by the statute, and held the position, performed the duties thereof, and received the salary fixed by law therefor, up to and including the month of May, 1921. In May, 1921, appellant by a written communication, which gave no reason therefor, attempted to discharge respondent, such discharge to take effect at the close of the month, and this action was filed on the last day of May to prevent the taking effect of the discharge until respondent's rights should be determined by the court.

The section of the statute referred to, so far as it relates to the question now to be considered, reads as follows:

“Section 4910-10. The county auditor of a county, the clerk of a city, or other district in which voting machines are to be used shall cause same to be properly prepared therefor; and for that purpose shall employ for such time as is necessary one or more competent persons who shall be known as the voting machine custodians, who shall be sworn to perform their duties honestly and faithfully, and for such purpose shall be considered as officers of election, and shall be paid for the time actually spent in the discharge of their duties in the same manner as other election officers are paid. One custodian shall be employed for each twenty machines; if more than one be employed they shall be selected from the political parties entitled to representation on a board of election officers: *Provided, however,* the county auditor of a county, the clerk of a city, or other district having two hundred (200) voting machines or more, shall appoint as a permanent employe, a competent mechanic who shall be known as the chief custodian of voting machines, who shall be sworn to perform his duties honestly and faithfully, and shall furnish a corporate surety bond in the sum of Five Thousand (\$5,000.00) dollars for the honest and

Dec. 1921]

Opinion Per TOLMAN, J.

faithful performance of his duties, and whose salary shall be the sum of Two Hundred dollars per month, to be paid out of the general fund of said county, city or other district, in the same manner as provided by law for the payment of salaries.

“Said chief custodian of voting machines shall supervise the work of all other voting machine custodians provided for by law, and shall school and instruct said custodians and have general charge and supervision of the work of said custodians in the preparation of voting machines for elections and shall check and approve the work of all custodians after the preparation of the voting machines for elections by said custodians, and shall also have charge of the instruction schools for election officials provided for by law, and shall have charge of the procuring and rental of all polling places in precinct where voting machines are to be used, and shall have continuous charge of the maintenance, upkeep and care of the voting machines of said county, city or district.

“No persons shall be eligible for appointment to the office of chief custodian of voting machines who shall not have had an actual experience in the duties as prescribed herein for the period of at least two (2) years in the conduct of elections with voting machines in a county, city or district conducting its elections with at least one hundred (100) machines.”

Respondent seems to stress the words “as a permanent employe,” and therefrom attempts to draw the conclusion that one appointed as chief custodian under this act becomes a permanent officer holding his office during good behavior, and his tenure of office cannot be subjected to the influence of partisan strife, or his place be subject to the spoils system in politics. There are no doubt good reasons why one in such a position should be entirely trustworthy, and why his continuance in office should not depend, directly or indirectly, upon the result of any election for which he may prepare and test the machines, but that lies with the legis-

lature. We see nothing in the legislative act, when considered in the light of the political history of this state, which has never heretofore provided for any officer, from the highest to the lowest, to hold during good behavior, which convinces us that the legislature was intent upon making such a radical change, or, if it were, why it should have used the language which it did, or fail to say so in clear and unmistakable terms.

When the fact is considered that the legislature was providing for two classes of custodians, the first temporary, to be employed for a day or two at a time covering the period necessary to receive and record the vote; the other permanent in the sense of being employed regularly the year around, for the purpose of repairing and caring for the machines while not in use, and instructing the persons who should be temporarily in charge of them on election day, and supervising them at such times, it is self-evident that the word "permanent" was used solely to distinguish between the two classes of custodians, and not for the purpose of fixing a term of office which might extend for the lifetime of the official. The supreme court of the United States, in passing upon a similar question arising under a similar statute, said:

"The tenure of the judicial officers of the United States is provided for by the constitution; but, with that exception, no civil officer has ever held office by a life tenure since the foundation of the government. Even judges of the territorial courts may be removed by the President. *McAllister v. United States*, 141 U. S. 174, 35 L. Ed. 693, 11 Sup. Ct. Rep. 949. To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life, or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We

Dec. 1921]

Opinion Per TOLMAN, J.

think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inference." *Shurtleff v. United States*, 189 U. S. 311, 47 Law Ed. 828.

Since, therefore, the legislature did not, in plain terms, provide that the chief custodian should hold office during good behavior, nor otherwise fix the term, the general rule must apply, that the appointing power may remove the officer at pleasure. *State ex rel. Lopas v. Shagren*, 91 Wash. 48, 157 Pac. 31; Mechem on Public Officers, § 445; 29 Cyc. 1371 and 1408; 22 Ruling Case Law, p. 562; 15 C. J. 494.

Indeed, this rule is admitted by respondent, and since we have found that the statute does not create an office to be held during good behavior, or fix a definite term, it follows admittedly that the county auditor, having by the terms of the act power to appoint a chief custodian, had also the power to remove him at pleasure.

The judgment of the trial court is reversed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16639. Department Two. December 16, 1921.]

CHARLES J. MACHEK, *Appellant*, v. THE CITY OF
SEATTLE, *Respondent*.¹

DEATH (5, 35)—INJURIES CAUSING DEATH—RIGHT OF ACTION—MEASURE OF RECOVERY—STATUTES—CONSTRUCTION. Where a minor child received personal injuries from which she later died, leaving parents dependent upon her for support, a right of action survives to her personal representative, under Rem. Code, § 194, to prosecute an action in behalf of such parents, the measure of recovery being the amount which the minor would have recovered for the injury had she lived, to be computed from the time of injury to the date of death.

SAME (14)—RIGHT OF ACTION—CONCURRENT ACTIONS—FOR WHOSE BENEFIT. An action by an administrator for the wrongful death of a minor may be prosecuted for the benefit of the parent or parents, under Rem. Code, § 194, independently of, and concurrently with, actions for support, under Id., § 183, as amended by Laws 1917, ch. 123, and for loss of services under Id., § 184.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 29, 1921, upon sustaining an objection to any evidence, dismissing an action for personal injuries sustained by a minor, since deceased. Reversed.

H. A. P. Myers, for appellant.

Walter F. Meier and *Frank S. Griffith*, for respondent.

MACKINTOSH, J.—The complaint in this case states that it was begun by the plaintiff, as administrator of the estate of Sophia Machek, who, at the time of her death, was a minor; that she was injured by the negligence of the respondent, on the 5th of January, 1920, and that, by reason of those injuries, she died on the 29th of the same month; that, from the time of her injury until her death, she had endured great mental and

¹Reported in 203 Pac. 25.

Dec. 1921]

Opinion Per MACKINTOSH, J.

physical pain and suffering, and places the compensation for her injuries at \$35,000. It further alleges that the deceased had no husband or child, and the action is prosecuted in favor of the father and mother of the deceased, residents of the United States, who at the time of her death, were dependent upon her for support. Such proceedings were had upon this complaint as to result virtually in sustaining a demurrer to the complaint, which places before us only the question as to whether the complaint states a cause of action.

Counsel for respondent have argued as to the effect of §§ 183, 184 and 194 of Rem. Code (1915); § 183 having been repealed by chapter 123, p. 495, Laws of 1917. A brief review of these sections and of the decisions interpreting them will be sufficient to answer the question presented in this case.

The sections repealing § 183, now read:

“When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony. (Sec. 1, ch. 123, p. 495, Laws of 1917.)

“Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.” (Sec. 2, ch. 123, p. 495, Laws of 1917.)

Section 184, Rem. Code, reads as follows:

“A father or in case of the death or desertion of his family the mother, may maintain an action as plaintiff

for the injury or death of a child, and a guardian for the injury or death of his ward.”

Section 194, Rem. Code, is:

“No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death.” For convenience the act repealing § 183 will hereafter be referred to as § 183.

I. Section 183 creates a cause of action where no common law right existed. The action, under this section, is maintained by the personal representative of the deceased for the benefit of the wife, husband, child or children, and if no such relatives exist, then for the benefit of parents, sisters or minor brothers, residents of the United States and dependent upon the deceased for support. We notice that this section does not refer to the death of a minor, but gives a right of action to the persons named for the damages occasioned by death. So far as the question before us is concerned relating to parents, it gives a right of action to dependent parents, and measures their recovery by the amount of support of which the wrongful death deprives them, such amount not being limited by the support which would have been furnished to such parents, in the case of a minor's death, to the period of minority.

Kanton v. Kelly, 65 Wash. 614, 118 Pac. 890, pre-

Dec. 1921]

Opinion Per MACKINTOSH, J.

sents a thorough discussion of the effect of this section, saying:

“Under § 183, if dependency is the basis of recovery, the measure of damage is greater, very much greater, than it would be under § 184. Under § 183, it is not limited, nor is the allowance to be measured by an arbitrary time limit. Under § 184, the recovery for services does not extend beyond the time when the child becomes of age. . . . Under § 183, the question of dependency is the paramount issue. Under § 184, aside from the issue of contributory negligence, the emancipation of the child would be about the only defense that could be set up.”

In *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917, the court draws the distinction between §§ 183, 184 and 194, and, among other things, at page 445, uses this language:

“ . . . a dependent parent, suing for wrongful death of a minor child, has a choice of actions between that conferred by § 183 as amended and § 184, but that the proof required would be different and that the measure of recovery would not be the same. One would rest in loss of support, the other in loss of service.”

Brodie v. Washington Water Power Co., 92 Wash. 574, 159 Pac. 791, contains a discussion of the actions maintainable under §§ 183 and 184:

“The statutes were enacted to overcome defects thought to exist in the common law. By the common law no person had the right to recover for the death of another, no matter how wrongfully or negligently caused, and the right of action possessed by a person injured did not survive his own life. The first section of the statute cited is plainly a survival statute. [sec. 194.] Its purpose is to preserve in the beneficiaries named therein such right of action as the injured person himself had because of the wrongful or negligent act causing the injury, and is confined to such personal

loss as the injured person sustained. The second [sec. 183], although originating in the same wrongful act or neglect, begins where the other ends and is confined to such loss and damage as the beneficiaries named have suffered by the death of the person injured. *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Thompson v. Seattle, Renton & S. R. Co.*, 71 Wash. 436, 128 Pac. 1070."

In the case of *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193, L. R. A. 1917D 1084, the effect of § 183 was considered, the court saying:

"Section 183 creates the right of action and defines those entitled to its benefits. . . . Section 194 falls within that class of statutes to which the rules of liberal construction and transposition of terms apply, for no right of action is created by it. It merely recognizes a right of action that existed in a living person whether at common law or in virtue of some statute at the time of the death of the party. The right was in the 'person' at the time of death. Such a right is one in kind with a chose in action."

II. Section 184 gives a cause of action to the father or, on certain contingencies, to the mother, for the injury or death of the child, and this right of action covers only the services of the child during minority, and is maintainable by the parent without regard to the question of the parent's dependence upon the minor for support. The section is an extension of the right which existed in favor of the parent against a tortfeasor for injury to the minor who survives such injury, the parent being entitled to damages for loss of services of such minor. Under § 183, such a right of action is extended to include the situation where the minor dies as the result of wrongful injury. For an interpretation of this section see the cases of *Kanton v. Kelly* and *Mesher v. Osborne*, *supra*. In the latter case, it was held that this section was not repealed by

Dec. 1921]

Opinion Per MACKINTOSH, J.

the enactment of §§ 183 and 194 by the legislature of 1909.

III. Section 194, unlike § 183, is merely a survival statute, providing for the survival of causes of action which a minor might have had had he lived, to be prosecuted by his personal representative if he die leaving a wife or child, or if no wife or child, then parents, sisters or minor brothers, residents of the United States and dependent upon him for support, the action to be prosecuted in behalf of the persons so named. The measure of recovery would be the amount which the minor would have recovered for the injury had he lived, to be computed from the time of the injury to the date of death.

Thompson v. Seattle, Renton & Southern R. Co., 71 Wash. 436, 128 Pac. 1070, was a case involving this section, and at page 443, the court remarked concerning the question:

“As we have said, the jury were limited in their award to compensation for the pain and suffering the injured person was compelled to undergo because of the accident, between the time of the accident and the time of her death. The jury could award nothing for her death, nothing for the losses caused the respondents by reason of her death, and nothing by way of punishment of the appellant because of its negligence. *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Holland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626.”

The cases of *Mesher v. Osborne* and *Brodie v. Washington Water Power Co.*, *supra*, show the distinctions between the actions maintainable under §§ 183 and 194.

Taking the exact situation which is presented by the complaint in this case, involving the death of a minor leaving no husband or child or children, but only dependent parents, we have this result, that the administrator could maintain an action for the benefit of the

parents to recover the amount that would have been contributed by the deceased to their support, this amount not being limited to what would have been furnished during decedent's minority only. Or, in the alternative, the parents themselves, whether dependent or not, could maintain an action in their own name for the loss of services of the minor, from the time the loss was occasioned until such time as the minor would have arrived at majority. And in addition to either one of the foregoing actions under either §§ 183 or 184, the administrator could maintain an action under § 194 in favor of the dependent parents for the damages suffered by the deceased from the time of the injury until death. This action is entirely independent of actions under either § 183 or § 184, and could be concurrently maintained with actions under either one of those sections. A complaint stating a cause of action under this section should not have been dismissed, as the cause of action stated could not have been affected by the fact, if it were one, that an action had already been begun under either § 183 or § 184.

The judgment of the lower court is therefore reversed, with orders to proceed with the trial of the case.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

Dec. 1921]

Opinion Per HOVEY, J.

[No. 16344. Department Two. December 19, 1921.]

FLORENCE F. RENO, *Appellant*, v. WILLIAM L. RENO,
Respondent.¹

DIVORCE (94)—ALIMONY AND SUIT MONEY PENDING APPEAL—JURISDICTION. Pending appeal in a divorce action, the superior court retains jurisdiction to order the husband to pay money to the wife to apply on the cost of her appeal, and also for clothing, medical attendance and a weekly allowance.

Cross-appeals from a judgment and order of the superior court for Franklin county, Truax, J., entered November 9, and 17, 1920, granting a divorce to both parties and directing the payment of alimony to plaintiff pending appeal, after a trial to the court. Affirmed.

Chas. W. Johnson, for appellant.

Edward A. Davis, for respondent.

HOVEY, J.—As might be assumed from the title, this is a divorce action.

The trial court granted a decree of divorce to each of the parties, and awarded the wife one-half of the community property and gave to the husband the other half of the community property, and did not award any portion of the husband's separate property to the wife.

After notice of appeal was given, the appellant secured from the trial court an order directing the respondent to pay certain sums to be applied on the cost of her appeal, and in addition thereto, a small weekly allowance and certain sums for clothing and medical attention. The respondent cross-appealed from this order and contends that the lower court was without jurisdiction to make it. We find no error in the mak-

¹Reported in 203 Pac. 2.

ing of this order. *Lewis v. Lewis*, 83 Wash. 671, 145 Pac. 980.

Appellant makes two contentions: First, that the evidence did not justify the decree in favor of the husband. Second, that she did not receive a sufficient award of property. No useful purpose would be served by reciting the evidence in this opinion. We have carefully examined it and believe that it sustains the action of the trial court.

The decree and order appealed from are both affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16670. Department Two. December 19, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. ALMANSON
M. LOVELACE *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS (319) — HEALTH REGULATIONS — ORDINANCE—POWERS OF CITY. An ordinance of a city of the third class for the disposal of garbage is a valid exercise of municipal power under Const., art. 11, § 11, giving any city power to make such local sanitary regulations as are not in conflict with general laws, and Rem. Code, § 7671-14, subd. (r) especially authorizing cities of the third class to enact and enforce local, police, sanitary and other regulations.

SAME (44)—ORDINANCES—VALIDITY—FRANCHISE. An ordinance providing for entering into a contract with the most satisfactory bidder for the disposal of garbage is not one granting a franchise, since no right or privilege is thereby granted.

SAME (99) — HEALTH REGULATIONS — ORDINANCE — VALIDITY — AWARD OF CONTRACT TO BIDDER. Where an ordinance authorizing the letting of a contract for the disposal of garbage to the highest bidder means to such person as the city council shall deem best qualified and equipped for the performance of the contract who would perform it for the lowest charge to the people served, and where there is no showing of its being productive of revenue, it cannot be held invalid.

¹Reported in 203 Pac. 28.

Dec. 1921]

Opinion Per HOVEY, J.

SAME (45)—ORDINANCE—VALIDITY—SUBJECT AND TITLE. The title of an ordinance reciting that it is one for the letting of an exclusive contract for the disposal of garbage and rubbish and providing certain penalties, is broad enough to cover a section requiring any person disposing of his own garbage at any designated dump to first pay to the city clerk a fee of one dollar and a half for each load.

SAME (45). The objection that the penalty of an ordinance is not covered by its title cannot be raised by one who is not charged with a violation of the ordinance.

Appeal from a judgment of the superior court for Clarke county, Simpson, J., entered July 14, 1921, upon a trial and conviction of violating an ordinance. Affirmed.

E. N. Livermore, for appellants.

Wm. C. Bates, for respondent.

HOVEY, J.—In this case the defendants were convicted of violating an ordinance of the city of Vancouver relative to the disposal of garbage. The case was disposed of upon an agreed statement of facts, and the only question presented is the validity of the ordinance.

Vancouver is a city of the third class, organized under the laws of this state relative to cities of that class. On August 16, 1920, the city passed an ordinance, a portion of which is as follows:

“An Ordinance providing for the letting of exclusive contract for the removal of manure, garbage, offal, refuse, rubbish, dead animals and all vegetable or animal matter detrimental to health and providing certain penalties and repealing Ordinance No. 578.

“The City Council of the City of Vancouver Do Ordain As Follows:

“Section I. That the city council shall, every five years or as frequently as may be required, let to the highest bidder for cash the exclusive right to collect, remove and dispose of all manure, garbage, offal, refuse, rubbish, dead animals, night soil, waste or refuse

substances or any vegetable or animal matter detrimental to health.

“Section II. Upon direction of the city council, the city clerk shall advertise for bids for the contract above provided, in conformity with the ordinances of the city of Vancouver, Washington, the first publication of said call for bids to be at least seven days prior to the time for opening same. The city council shall have the power to refuse any and all bids and shall award said contract to the person in their mind best qualified and equipped for performance of its contract. In submitting bids every person bidding shall specify the rates and charges and times of collection to be made by him.

“Section III. Every successful bidder shall furnish surety bond to the city of Vancouver in the sum of one thousand (\$1,000) dollars, conditioned upon the faithful performance of his contract and compliance with all the ordinances of the said city, and such bidder shall maintain an office within said city equipped with a telephone.

“Section IV. It shall be unlawful for any person to perform any of the things herein enumerated except the person to whom such contract is awarded, provided, however, that this shall not prohibit any person from anywise disposing or removing his own garbage to any designated city dump, nor shall it apply to such businesses that have garbage for sale for cash or its equivalent.

“Section V. Every contract entered into by virtue of this ordinance shall specify that the city of Vancouver may terminate such contract upon sixty days written notice, upon condition that the city purchase all equipment used in connection therewith at a value to be determined by a board of appraisers, one to be appointed by said contractor, one by the city and the third by the two thus appointed.

“Section VI. Any person disposing of his own garbage at any designated dump shall first pay a fee of one and 50/100 (\$1.50) dollars for each load removed by him, to the city clerk.”

Dec. 1921]

Opinion Per HOVEY, J.

Thereafter the city advertised for bids, as provided in the ordinance, and from the bids received accepted the one presented by Sherman Drew and made a contract with him in accordance with the terms of the ordinance.

The first contention made is that the city is without authority to enact an ordinance of this kind because the subject is not specifically mentioned in the law relative to cities of the third class. Appellants rely upon *Wilson v. Beyers*, 5 Wash. 303, 32 Pac. 90, 34 Am. St. 858. That was a case where a town was held not to have the power to impound live stock running at large in the streets, because of the fact that the law relative to the town was a part of the general statute (Laws 1889-90) relative to cities and towns in which the power was specifically given to the higher class municipalities but was not mentioned in defining the powers of towns. It was, however, said in that case that the power would probably be embraced within the police powers of the town and covered by its general welfare clause, if the act did not seem to show an intent by the legislature to withhold the power from this class of municipalities.

The general law relative to all municipalities was subsequently superseded as to cities of the third class by a complete law as to such cities, passed by the legislature in the year 1915, and since that time each class seems to have been separately treated by the legislature, except for certain general laws on special subjects. By subdivision (a) of § 14, p. 655, of the act of 1915 (Rem. Code, § 7671-14; P. C. § 797), the city is given power "to pass ordinances not in conflict with the constitution and laws of this state or of the United States." Subdivision (r) p. 658, Laws of 1915, reads as follows:

"To make all such ordinances, by-laws, rules, regulations and resolutions, not inconsistent with the consti-

tution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government and welfare of the corporation and its trade, commerce and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter, and to enact and enforce within the limits of such city all other local, police, sanitary and other regulations as do not conflict with general laws.”

In our opinion, one of the most important functions of a city is to provide for the health of its inhabitants, and it cannot be doubted but what the non-removal of the matter defined in the ordinance would be a serious menace. The right of a city to function in this manner seems to be generally recognized. Article 11, § 11, of the constitution reads as follows:

“Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.”

In *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220, an ordinance on this subject was sustained as to cities of the first class, and a great many authorities are cited in support of the right under the general powers of a city. We are satisfied that this first objection is not well taken.

For their second contention, appellants maintain that the ordinance is one granting a franchise and is invalid because passed upon the day of its introduction, in violation of § 7671-12, Rem. Code (P. C. § 795), which requires that ordinances of this character shall not be passed until five days after their introduction and without being first submitted to the city attorney, and they cite *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. 693, to the effect that an ordinance granting the exclusive right to one person of this privilege

Dec. 1921]

Opinion Per HOVEY, J.

is an ordinance granting a franchise. In our opinion, it is not necessary to decide the effect of such an ordinance under our laws, as the ordinance in question simply provides the method by which the city proposes to take care of garbage and no right or privilege is granted by it. The subject-matter in this case is disposed of by contract, and the city in so acting is merely providing an agency for the carrying into effect of one of its corporate functions.

The third point made by appellants is that the ordinance is void because it requires the contract to be awarded to the highest bidder. Appellants cite one case, *Dreyfus v. Boone*, 88 Ark. 353, 114 S. W. 718. We are not supplied with a copy of the contract made under this ordinance, but we gather from the briefs that the contract was in fact let to the person best equipped to do the work who would perform it for the lowest charge to the people served, and if any revenue whatever is derived by the city, no showing is made to that effect. We believe that a contract of this sort is what the ordinance contemplates, construed as a whole, and if any revenue is derived by the city it would be merely incidental to the main purpose of cleaning up the city at the lowest cost possible consistent with efficient results.

The fourth point made by the appellants is that the ordinance is void because by § 6 a charge of \$1.50 per load is made to the individuals who haul their own garbage to a city dump, which provision they claim is not covered by the title of the act. The appellants are not in any position to raise this question, as the charge against them is not the violation of this section, but we are asked by respondent to dispose of the question. We believe that it is covered by our previous decisions establishing the rule that the title of an act is sufficient

if it covers the general subject-matter and it is not necessary that it be an index. *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735.

The judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ.,
concur.

[No. 16498. Department Two. December 19, 1921.]

ELMA S. HERREN, *as Administratrix etc., et al.*,
Respondents, v. S. L. HERREN, *as*
Administrator etc., et al.,
Appellants.¹

APPEAL (452)—REVIEW—HARMLESS ERROR NOT AFFECTING TRIAL DE NOVO. On trial *de novo*, the supreme court will consider evidence erroneously excluded and disregard evidence erroneously admitted.

TRUSTS (19)—RESULTING TRUST—EVIDENCE—SUFFICIENCY. Where one brother took title to farming property in his own name, no resulting trust in favor of another brother to an undivided half interest was created, where there was no evidence of the latter's having furnished one-half of the purchase money from his own funds or property.

SPECIFIC PERFORMANCE (16-1, 17)—CONTRACTS ENFORCEABLE—ORAL AGREEMENT TO CONVEY LAND—POSSESSION AS PART PERFORMANCE. Part performance of an oral contract to convey land is not established by evidence that a son had been given possession of the property, merely from the fact that such son had remained on the property with his parents and worked it since majority, since that would constitute no change of possession, constructive or otherwise.

FRAUDS, STATUTE OF (42)—SPECIFIC PERFORMANCE (51)—ORAL AGREEMENT TO CONVEY LAND—EVIDENCE—SUFFICIENCY. An oral agreement to convey land, partly performed, need not be shown by proof that removes all uncertainty, but it is sufficient if, from the whole evidence, even if conflicting, the contract can be determined with reasonable certainty.

HUSBAND AND WIFE (64, 67)—COMMUNITY PROPERTY—CONVEYANCE OR SALE BY HUSBAND. An oral promise by one spouse to convey .

¹Reported in 203 Pac. 34.

Dec. 1921]

Opinion Per HOLCOMB, J.

property cannot be enforced against the other spouse who did not join therein.

SPECIFIC PERFORMANCE (24-1, 28)—GIFTS—ORAL PROMISE TO CONVEY LAND—PERFORMANCE BY PLAINTIFF—EVIDENCE—SUFFICIENCY. Where a father had deeded one of his sons an undivided one-half interest in the home farm, which was community property, in which deed the mother admits she would have been willing to join had she been requested, and the evidence shows the son had worked and managed the place since attaining majority with that understanding, sufficient is shown to uphold the claim of a parol agreement for the conveyance of a one-half interest to him.

COSTS (62)—ON APPEAL—MORE FAVORABLE JUDGMENT. Costs of appeal are allowable to appellants who recover substantial benefits by their appeal.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered December 29, 1920, upon findings in favor of the plaintiffs, in consolidated actions for equitable relief, tried to the court. Modified.

S. C. Herren and H. E. Donohoe, for appellants.

Chas. M. Fouts and C. B. W. Raymond, for respondents.

HOLCOMB, J.—A. J. Herren died intestate February 16, 1920, in Lewis county, leaving surviving him his widow, Jane Herren, and their children, Hugh Herren, Susie Herren and E. Benjamin Herren, as his only heirs at law. On June 28, 1920, E. Benjamin Herren died intestate in Lewis county, Washington, leaving surviving him his widow, Elma S. Herren, and their minor son, Robert D. Herren, as his only heirs. On July 22, 1920, Elma S. Herren was appointed administratrix of the estate of E. B. Herren, and also was appointed general guardian of their minor son, Robert D. Herren, and qualified in each of those capacities. In August, 1920, Samuel L. Herren was appointed administrator of the estate of A. J. Herren, deceased, the widow having waived her right.

This appeal is from a decree in two consolidated actions. One was an action of Elma S. Herren, in her own right and as administratrix, and as general guardian of Robert D. Herren, a minor, against the appellants, claiming, through her deceased husband, ownership of 308 acres of land, described as the Herren home place, comprising what was originally the Morgan donation land claim, and a part of the Bouchard donation land claim; and alleging in effect that appellants were the holders or owners of bare legal title, and have refused to transfer the same to her deceased husband or his successors in interest. Subsequent to the commencement of the foregoing action, appellants instituted an action against respondents, claiming ownership of all the property that had been inventoried by respondents and filed in the records in the estate of E. B. Herren, deceased, particularly describing the property, both real and personal, as it appeared in the inventory of E. B. Herren, deceased.

In their action for specific performance, respondents alleged that there was an oral agreement made and entered into between E. B. Herren and his father, A. J. Herren, in effect as follows:

“That in consideration of the services rendered by E. B. Herren in liquidating several thousand dollars of indebtedness incurred by A. J. Herren, for which said premises were bound, and in further consideration that the said E. B. Herren will continue to reside upon said premises, orally agreed to convey the whole of said premises to E. B. Herren by a good and valid deed of conveyance, with the understanding that the said A. J. Herren and wife could, during their lives, occupy the residence upon said premises, and did then place said E. B. Herren in possession of the whole of said premises, which possession he retained to the time of his death, and that no time was specified for the execution of said deed, but it was understood by the

Dec. 1921]

Opinion Per HOLCOMB, J.

parties making said oral agreement that the said A. J. Herren and Jane Herren, upon demand would each, by a valid deed, convey an undivided one-half interest in said premises to said E. B. Herren. That said oral agreement was negotiated by said A. J. Herren, and that the said Jane Herren agreed to abide by what her husband did, and ratified, at all times up to the death of said E. B. Herren, the said agreement, and recognized the existence of said agreement as their valid obligation."

The complaint further alleges that E. B. Herren, relying upon that agreement, took possession of the premises, and thereafter spent many thousands of dollars in clearing, fencing and repairing buildings and preparing the premises for suitable cultivation and occupancy, and otherwise improving the property, and in the paying of taxes and defraying of other expenses, all of which was done with the knowledge and consent of A. J. Herren, and that E. B. Herren exercised the right of ownership of the premises; and that, on or about September 6, 1919, the parties interested made a division of all the real estate, and, among other transactions, A. J. Herren made, executed and delivered, by and with the consent of his wife, Jane Herren, a deed of an undivided one-half interest in and to all the home place involved.

The defendants answered the complaint of respondents and set up a general and specific denial of all the material matters set out in the complaint; and by way of affirmative defense, allege that the property described in respondents' complaint was at all times the community property of A. J. Herren and Jane Herren, his wife; that they lived and resided upon the place for upwards of thirty years, paid all the taxes, and that no one questioned their ownership or possession; that A. J. Herren died intestate on February 17, 1920; that the widow, Jane Herren, according to the law of de-

scent, is the owner of an undivided one-half, with all her homestead rights in the whole of the estate; that the children and heirs, according to the laws of descent, were the owners in fee of the other undivided one-half, and that the widow, Jane Herren, and the heirs and administrator of the estate of A. J. Herren are now in possession of all of the property described. They further affirmatively allege that A. J. Herren and wife lived on the property for many years with their children, and cultivated the same; that the son Ben Herren was permitted to handle the funds and manage the place merely as a son and not otherwise; that they worked together and were prosperous, without any understanding or agreement as to the division of the property or the proceeds of the same; that the title was at all times held by A. J. Herren and wife; that there was no contract to convey, as alleged in the complaint; that all the money Ben ever had or made was made there on the home place, and that the family living there helped him to do it; that all improvements and taxes were paid for out of the joint efforts, from the property on the place, all working together.

They further allege that the deed attempted to be procured by E. B. Herren from A. J. Herren of an undivided one-half interest in the Herren home place was procured at a time when A. J. Herren was without sufficient mental capacity or understanding to make or deliver a deed; that he did not know what he was doing, by reason of his extreme illness, and that the deed mentioned in the complaint was void under the statute, in that it was not joined in by the wife of A. J. Herren, the property being community property.

It is further alleged that the oral agreement alleged by respondents to convey was void, not having been in writing and relating to real property.

Dec. 1921]

Opinion Per HOLCOMB, J.

These several affirmative matters were put in issue by appropriate denials.

The trial court made findings in favor of respondents, decreeing specific performance of the alleged oral contract to convey the 308 acres of land, and finding that the personal property upon the farm, consisting of stock, machinery and implements, was the property of the estate of E. B. Herren, and that the \$3,000 in United States liberty loan bonds, which had been purchased by E. B. Herren, was the property of his estate, and that the \$9,000 worth of United States liberty loan bonds, and some \$6,000 worth of municipal and county bonds, were the property of the estate of A. J. Herren, deceased.

Forty-one errors are claimed by appellants, some of which are well taken, but we shall not discuss them all separately. Among other things, the court made some findings which there is absolutely no evidence to support, and we presume were made by inadvertence at the request of prevailing counsel. The court, also, in summing up the evidence, appears to have made several incorrect statements, due, no doubt, to lapse of memory after the conclusion of a very lengthy and complicated trial. We shall, however, consider all evidence which is here which should have been admitted, and disregard any which should have been rejected by the trial court, since we must try the case *de novo* upon the whole record.

Prior to the year 1887, A. J. Herren purchased the 308 acres of land in controversy. In that year he moved upon the property with his family, consisting of his wife and six children—five sons and one daughter—the sons' names being Harry, Hugh, Ben (or E. B.), Samuel (or S. L.), and Judson, and one daughter, Susie. The family, with the exception of those who

have since died, namely, A. J. Herren, the father, Harry, Judson and Ben, with the exception of Hugh, who lives in Puyallup, are still living upon the property. The daughter remained unmarried, and has resided with her parents all her life, and was about forty-one years old at the time of the death of her father. E. B., or Ben, was forty-six years old at the time of his death, and had lived upon the premises in controversy ever since his thirteenth year. During the years from 1888 to 1894 or 1895, A. J. Herren engaged in conducting a mercantile business and a saw mill in the town of Toledo, Washington, with his eldest son, Harry. During this time he mortgaged the home place for an amount not disclosed by the records in this case, and during the financial stringency of the early 90's he was unable to pay the indebtedness, and the mortgage was foreclosed. The financial stringency also caused him to close up his mercantile business and his milling and logging business at Toledo. His eldest son, Harry, moved away to Idaho, and the next son, Hugh, became manager and took charge of the farm.

When the sale took place under the mortgage foreclosure in 1895, the father, rightfully taking advantage of the statutes regarding possession of the farming lands during the period of redemption from sale, leased the home place to Hugh for the year of redemption, at the time advising Hugh that this was done so that the crops then growing on the place during the period of redemption might be secured. He also sold the saw mill which they had owned for about \$2,000, and turned the money received from the sale over to Hugh to be used in working the home place and in the purchase of stock and implements necessary to operate the same. During this period the father took his two younger

Dec. 1921]

Opinion Per HOLCOMB, J.

children, Susie and Judson, to Seattle to attend school for two or three years, leaving his wife and the other boys, Hugh, Ben and Sam, on the home place. Ben had then just come of age. Hugh took possession under the lease and worked the place, but did not succeed in redeeming it at the end of the year, and subsequently took another lease from the purchasers at the foreclosure sale, through their agent, and continued in possession under that lease until he repurchased the entire property in his own name from the owners. Hugh ultimately paid off the entire indebtedness, and in so doing used about \$1,600 of money received from the sale of hops which he grew during three years at Puyallup, and in connection with the proceeds of the farm. In April, 1900, he and his wife redeeded the property to A. J. Herren, and left it. Hugh worked upon the place until he was thirty years of age. During that time all the other members of the family, including the mother and Ben, and excepting Harry, the eldest son, and Judson, the youngest son, and Susie, also worked upon the place. When Hugh left the place, he and Ben started a butcher business in Puyallup in partnership, under the name of Herren Brothers. The stock raised and fattened on the farm was shipped to Hugh in Puyallup and sold.

After the property had been repurchased, and after Hugh left, Ben became his father's superintendent and chief man on the place and took the active management and control of it, by and with his father's consent, and directed practically all of the business in regard to the operation of the farm. The father and mother, and for some time the brother Sam, and the daughter, also remained upon the place and worked thereon. The father aided, assisted and advised Ben in the control and management of the place, mended implements and

machinery and fences, assisted in taking care of a number of milch cows, and feeding and taking care of the stock. The mother and Susie, the daughter, cooked the meals for the family and hired help, raised chickens and other fowls, and almost supplied the home with groceries from the sale of eggs and the like. The daughter assisted in milking the cows and in marketing the cream, and also taught school for three years, and turned over a part of her salary to her brother Ben to be used by him as he saw fit. She also performed the usual chores that are to be performed upon a farm. The son Sam (or S. L.) assisted in repairing and keeping up the machinery and in general chores about the farm. Harry, the eldest son, who went to Idaho, took up a timber claim, and later died. Having no wife or children, his parents were his sole heirs at law. They afterwards sold the timber claim in 1906, and the net proceeds amounted to \$12,650. That money was used by A. J. Herren. Three thousand nine hundred dollars of it was invested in an eighty-acre tract for the daughter. A portion of the balance seems to have been used in the purchase of municipal bonds, and later of liberty bonds. After Hugh left the place and Ben took the management, he was given as much authority about the place as his father had himself. The banker with whom they did business testified that the father came to his bank with Ben and instructed him as follows:

“ ‘Ben looks after all my business and whenever he wants to make out any checks it is all right with me. Whatever he does is all right with me.’ We were authorized to pay any checks drawn by E. B. Herren.”

The checking account of the father averaged, ordinarily, about ten times that of Ben, he stated.

Ben retained the management of the place for twenty-five years, until his death. During all that time

Dec. 1921]

Opinion Per HOLCOMB, J.

he lived with his parents, except the last two years when he built another house on the land near the home of his parents and went there to live with his wife and child. He was not married until about nine years before his death. Hugh testified that, when he left the place in 1900 to go to Puyallup, he had \$20 and Ben had less. The facts all show that Ben was an exceedingly active, energetic and capable man, and that his sense of filial duty towards his parents was strong. In fact, the unity and concord shown between the parents and children, and between the children themselves, is much more manifest than the ties of consanguinity often display. They worked together and they accumulated a large amount of valuable property. Those remaining at home with the parents seem to have considered almost everything in common. Ben improved and used Susie's land as if it were his own, and used all the property of the home place as if it were his own, and this with entire good faith on his part and good will on the part of the rest.

About September 6, 1919, A. J. Herren was extremely ill and expected to die, and at that time Ben called on Bran, president of the Toledo Bank, to come to his home. Ben told him that his father was not very well, and he wanted to dispose of his property so it would not have to go into court in case he died. Four deeds were made; one to a piece of North Carolina land, not disclosing to whom it was made, but possibly to perfect some old title; another to Hugh Herren for a forty-one acre tract that lay outside of the 308 acres; another to Sam for a tract known as the "Worthington Tract," of about 108 acres, part of which was valueless; and another to Ben of *an undivided one-half of the 308 acre* home place. All these deeds were made at the instance of Ben. All of them were acknowledged

by A. J. Herren before Bran as a notary public. All of them were signed and acknowledged by Jane Herren before the notary public, except the deed to the half interest in the home place. She was not asked to sign that. She testified at the trial that, if she had been asked, she would probably have been willing to sign the deed *to the half interest in the home place*. There is some conflict as to the extent to which the other children participated in the transactions of September 6, but it is certain that they and Mrs. A. J., or Jane, Herren, knew about them.

There is no evidence that Ben Herren contributed anything to improve the place after he was put in active control of it, except what he obtained from the property and the proceeds of his labor upon the place. There is no evidence that there was any agreement as to the division of the proceeds at any time. The farm and the proceeds thereof and the acquisitions of all of them seem to have been considered mere common funds by all of them. They let Ben take what he pleased, and while he did not attempt to override his father and mother, or the rest of them, he became prosperous by his use of the place and its proceeds. The stock and implements that were upon the place when he took control were stock and implements that had been acquired by Hugh during his management, from the proceeds of the \$2,000 which had been turned over to him, and the proceeds of the farm. Afterwards, through his accumulations from the moneys which he was allowed to retain willingly by the other members of the family, Ben became fairly prosperous, and during the war bought \$3,000 worth of bonds, and purchased the forty acres deeded to Hugh on September 6, 1919, for \$3,000, paying \$1,500 in cash and borrowing the balance from his mother.

Dec. 1921]

Opinion Per HOLCOMB, J.

There is no evidence whatever of an agreement to convey the entire home place to Ben by his father and mother; and it is beyond dispute that the home place became community property when it was reconveyed to A. J. Herren by Hugh. While it is insisted that no consideration was paid therefor at the time Hugh reconveyed to his father, Hugh admits that he afterwards received enough money from his father to repay him for all that he paid out for the repurchase of the place, over and above what he received from his father to start with.

It is insisted that, when Hugh took title to the property in his own name, a resulting trust was created instantaneously in favor of his brother Ben for an undivided one-half interest therein, because his brother Ben had furnished one-half of the purchase money to purchase the property. There is absolutely no evidence that Ben had earned one-half of the purchase money, or any definite amount. All the evidence there is is that Ben worked upon the place with Hugh, while Hugh was managing it, and that he went into partnership with Hugh in the butcher business for about three years from 1900, and that they paid part of the purchase price which was paid to repurchase the place from funds derived from the partnership in the butcher business. How much was not shown. It is shown that Hugh paid \$1,600 of the funds to repurchase the place from moneys he earned in raising hops at Puyallup, in which Ben had no interest whatever. The only evidence of any right of Ben's to the conveyance of the place is that of two witnesses who had been hired hands upon the place, who testified in one case that the father told him that if he had his way Ben was to have the place; in the other instance, that Ben was to have the place. Neither one testified that the old gentleman told

either of them that he had contracted to convey the place to Ben. No witness testifies as to anything that Ben was to do to earn the conveyance of the place from his parents, or exactly what he should do for his parents. They lived with him and he lived with them, but whether one furnished more support to the other than he received does not appear. No witnesses testify that the mother ever made any agreement to convey the entire property to Ben, and she testified positively that she did not; that she knew of no agreement to convey the place to Ben. She insisted that she had all her community rights in the home place, and in all the stock and machinery thereon. Respondent's contention that a resulting trust for at least a half interest in the home place existed in favor of Ben cannot be sustained. In fact there is no aliquot part of an interest in the home place that can be shown by any definite contribution from Ben of his own funds or property which would result in a trust in his favor. *Croup v. DeMoss*, 78 Wash. 128, 138 Pac. 671.

Respondents contend, also, that giving Ben possession of the home place and allowing him to continue in possession for a long period of time was such a part performance as would entitle him to specific performance.

There was absolutely no change of possession, constructive or otherwise. Ben had been living with his parents since majority, and he remained. They occupied all things in common. Even Samuel, who lived on an adjoining tract of ten acres, built a store on the 308 acre tract, near his residence, about eighteen years before 1920, which building was worth about \$1,000, and which still remains on the land, and did business from the store for a number of years. He discontinued it during war times. He also pastured, in common

Dec. 1921]

Opinion Per HOLCOMB, J.

with the rest of the family, about 100 acres of the home place. He also cultivated a small portion of it for a time and received the proceeds and retained them without accounting. He built the store building on the land with his parents' consent, and they furnished him part of the money, and Ben, while it was being erected upon the land, and afterwards, made no objection. Ben's possession of the home place is no stronger or different than that of Susie, his sister, who also resided thereon, in the same house, continuously, with the exception of the two or three years she was in school in Seattle. The only difference between Ben and the others is that, as heretofore stated, his father gave him the management and control of the place in his place and stead. The land continued to be taxed during all these years in the name of the father, as well as the personal property. In fact, no change of any kind was made that would show that Ben possessed the premises in any different capacity than he had during his minority, or did up to the time Hugh left.

We do not agree with appellants' contention that an oral agreement to convey land must be shown by proof that removes all uncertainty. It is sufficient if, from the whole evidence in the case, the contract can be determined with reasonable certainty. It is the duty of the court to ascertain, if it can, what the terms of the contract were, although the evidence may be somewhat conflicting. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Coleman v. Larson*, 49 Wash. 321, 95 Pac. 262; *Velikanje v. Dickman*, 98 Wash. 584, 168 Pac. 465.

But, as said in the last cited case, every case of this character essentially rests upon its own facts. In this case, there are no such facts as existed in the *Velikanje* case. In that case there were declarations by the al-

leged oral grantor to third persons, which, construed in the light of all the circumstances, proved by inference that the contract had been made, though the grantee's lips were sealed by the statute because the grantor's lips were sealed by death.

That is true also in this case; but in this case the alleged grantor had never made any admissions or declarations to third persons that he had made an agreement to convey the place to Ben. And since it was community property, as alleged by respondents and admitted by them at the trial, and, as we hold, conclusively shown by the evidence, he could not convey or incumber the property without being joined therein by his wife.

There is evidence, however, both by act and inference, that it had been agreed that Ben was to have half of the home place, or an undivided one-half interest. Exactly what is not known, except as shown by the deed of September 6, by which the father, at Ben's own request, conveyed an *undivided one-half interest* to Ben. These circumstances tend to prove that Ben did not have an agreement for the entire place, or expect a conveyance of the entire place. When both were alive, Ben asked his father for what had either been agreed upon by them or was considered his right. He did not ask his mother to join in the deed of the half interest of the home place, although he asked her to join in every other deed that was executed at that time. He might have thought that an undivided one-half interest could be conveyed by his father without his mother joining; and his mother testified that she might have been willing, had she been so requested, to join in a deed to Ben of an undivided one-half interest; and since she made this admission, we are inclined to believe that she must have understood, during all those

Dec. 1921]

Opinion Per HOLCOMB, J.

years that Ben worked and managed the place, that he was to get a half interest, or one-half of the place. We believe that, as to the one-half interest in the home place, the evidence brings this case within the rule that a parol agreement for the conveyance of real property will be enforced where it has been fully performed by the promisee. *Coleman v. Larson, supra*.

It is our judgment, therefore, that specific performance be enforced to the extent of a conveyance by Jane Herren and by the administrator and heirs of A. J. Herren to the heirs of E. B. Herren of an undivided one-half interest in the 308 acres of land in controversy. The evidence in the case, equity and good conscience do not justify our going any further.

As to the stock, implements and machinery used in farming the premises, there is no doubt that they were acquired and accumulated in exactly the same way. Undoubtedly, if he gave Ben an undivided half of the land, the father also gave Ben an undivided one-half of all the personal property upon the place used in farming it, and the accumulations and increase thereof. There is no evidence except the circumstances justifying that, and there is absolutely no evidence that the personal property was given to Ben or had been purchased by Ben, or had become Ben's in any other way. The trial court decreed that the estate of E. B. Herren was entitled to all the stock, implements and machinery upon the home place. That decree will be modified so that the decree will be that each estate, and the administrator or administratrix thereof, owns an undivided one-half interest in all such personal property, except certain specific items which the trial court found belonged individually to one or the other of the parties, which will not be changed.

The \$3,000 of liberty loan bonds, which were decreed

to be the property of the estate of E. B. Herren, were, to all intents and purposes, conceded by the appellants to so belong, and that portion of the decree will not be changed.

The \$9,000 of liberty loan bonds, and the other municipal bonds, were all proven incontrovertibly to have been purchased by A. J. Herren, and to belong to his estate. That part of the decree will stand as to them.

The \$1,000 worth of savings stamps, which were given to the daughter, were conceded to have been her property and will remain the same.

The title to two other tracts of real estate were quieted in the estate of E. B. Herren, of which appellants complain that since that was not prayed for by respondents in their complaint and is not involved in this action, was erroneous. Since no one was harmed by that, if it is any benefit to the estate of E. B. Herren, we will not interfere with it.

The cause is remanded with instructions to the lower court to proceed in conformity with this opinion. Appellants, having recovered substantial benefits by their appeal, will be allowed their costs on appeal.

PARKER, C. J., and HOVEY, J., concur.

MACKINTOSH and MAIN, JJ., concur in the result.

[No. 16700. Department One. December 19, 1921.]

**W. E. HOFFMAN, *Respondent*, v. JENS L. HANSEN *et al.*,
Appellants.¹**

MASTER AND SERVANT (20-1)—INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—"PLANT"—SCOPE OF EMPLOYMENT—ELECTION OF REMEDIES. An electric railway motorman who had registered for his daily service and then left the plant and premises in pursuit of his own pastime, prior to taking up the duties of his employment, and was injured in a street accident, does not come within the provisions of Rem. Code, § 6604-3, requiring him to elect in advance of suit whether to take under the workmen's compensation act or seek a remedy against the party liable for the injury.

MUNICIPAL CORPORATIONS (380, 391)—STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—RIGHT OF WAY. An ordinance giving vehicles the right of way over pedestrians between street intersections and crossings does not confer the absolute right of way upon the vehicle, but imposes upon the pedestrian a higher degree of care than at regular crossings.

SAME (390)—USE OF STREETS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Whether plaintiff could have been injured by an automobile as he claimed, in view of testimony as to the part of the automobile with which he came in contact, was a matter for the jury, and not ground for a motion for judgment notwithstanding the verdict.

SAME (390). Where the evidence in an action for personal injuries showed that an automobile without lights, while it was still dark, was driven at an excessive rate of speed, swerved from near the middle of the street to a point at or near the curb and ran down plaintiff while he was endeavoring to get from the street to the curb, it presented a question for the jury, and was not subject to motion challenging the sufficiency of the evidence nor to motion for judgment notwithstanding the verdict.

NEW TRIAL (39)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CREDIBILITY. A new trial will not be granted for newly discovered evidence which goes merely to the credibility of the opposite party as a witness.

SAME (22)—GROUNDS—SUFFICIENCY OF EVIDENCE. In an action for personal injuries, defendant is not entitled to a new trial on the ground plaintiff swore falsely as to having a child, when in

¹Reported in 203 Pac. 53.

fact the child had been adopted by his mother, there being no examination as to the support of the child, and the matter of the child was only incidentally brought out in cross-examination.

MUNICIPAL CORPORATIONS (392)—USE OF STREETS—NEGLIGENCE—INSTRUCTIONS. Where a traffic ordinance had been introduced in evidence, though not pleaded in the complaint, it was not error for the court to charge the jury that automobiles are required to keep as near the right-hand curb, in the direction in which they are going, as is practicable, when it clearly appeared that the situation at the scene of the accident made the instruction proper.

TRIAL (116)—INSTRUCTIONS—AS A WHOLE. Particular portions of instructions which as a whole correctly state the law cannot be segregated and assigned as error.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 14, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Roberts & Skeel, for appellants.

Crowder & Crowder, for respondent.

MITCHELL, J.—This is a personal injury action, brought by W. E. Hoffman against Jens L. Hansen and Hansen Bread Company. The defendants have appealed from a judgment against them.

Many of the facts are in dispute, but there is ample evidence to show that the accident causing the injuries happened February 2, 1920, before daylight. The respondent was a motorman operating an electric street car for the city of Seattle out of its car barns, situated on the east side of Fifth avenue north and north of its intersection with Republican street, the two streets crossing at right angles. His run for the day commenced from the car barns at 6 a. m. He was required to register in not less than ten minutes before his service commenced (he could register in as much earlier as he wished), and after registering in until

Dec. 1921]

Opinion Per MITCHELL, J.

the service started, the time was his own to do as he pleased. On the morning in question, he registered in at 5:35, after which, as was his habit, he took a walk on the street. He went south on Fifth avenue and returned on the west side of it. Upon reaching a point about midway between Republican street and Harrison street (the latter being the next street south of Republican street), he decided to cross over diagonally from that point to the Roslyn Cafe, in the building at the southeast corner of the avenue and Republican street, to get a cup of coffee. This was about 5:50 a. m. Upon stepping off the curb, he noticed a well lighted touring car approaching from the north, in or near the middle of the avenue, at the rate of fifty to sixty miles an hour. He stepped back onto the curb until the car disappeared to the south. Thereupon he again started to cross the avenue, and on taking one or two steps into the street, he noticed an unlighted car, about seventy-five feet away, near the center of the avenue, approaching from the north at twenty-five to thirty-five miles an hour. He hollered "put on your lights," and stepped back towards the curb, and instantly was struck by the car and knocked some fifteen to twenty feet onto the parking strip. He was seriously injured. After striking him, the car ran up on the parking strip for a distance of fifteen to twenty feet, then turned to the left and stopped, standing across the avenue with the rear wheels near the curb. The auto was a Ford delivery truck belonging to the appellants, and was being driven by an employee in the delivery of bread from their bakery near by.

It is contended the respondent was under the workmen's compensation act at the time he was injured, and that, if he was not, the trial court erred in not holding he could not maintain this action without hav-

ing first made and filed an election to sue. Unquestionably, the occupation or employment as street car conductor is classified as extra hazardous and is within the terms of the act, §§ 6604-2, 6604-4, Rem. Code; but § 6604-3, in defining words employed in the act, says:

“Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in § 6604-4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from his injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; . . .”

Situated and engaged as he was at the time of the accident, it cannot be said, upon a liberal construction of the act, that he was upon the premises or at the plant of his employer. He was upon the sidewalk and street, in a sense entirely disassociated from the street railroad and its service. Nor can it be said that, while thus away from the plant of his employer, he was in the course of his employment. At the time he was injured, he was engaged in the exercise or pastime of walking, and was no more in the course of his employment than if, at that time, he had been away engaged in the exercise or pastime of boating or automobiling. The complaint being that his injuries were due to the negligence or wrong of another, who it appears was not in the same employ, and it appearing

Dec. 1921]

Opinion Per MITCHELL, J.

he was injured at a time he was not in the course of his employment and was away from the plant of his employer, it follows that the provisions of the act requiring him to elect whether to take under the act or seek a remedy against such other, and that such election shall be in advance of any suit under this section, is not applicable.

It is claimed the challenge of the defendants to the sufficiency of the evidence and a motion for judgment notwithstanding the verdict should not have been denied. The contention involves the defense of contributory negligence, and it is argued that, as the accident occurred between street intersections, the respondent assumed the risk, and that the driver of appellant's automobile had the absolute right of way. The argument goes too far. The case of *Crowl v. West Coast Steel Co.*, 109 Wash. 426, 186 Pac. 866, is relied on by appellants. That case is not in point. It considers an ordinance of Tacoma that differs materially from the one in this case. The one here provides: "Pedestrians shall have the right-of-way over vehicles at street intersections and crossings; vehicles the right-of-way over pedestrians between street intersections and crossings." Of this ordinance it was said in the *Crowl v. West Coast Steel Co.* case, quoting from the case of *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649:

" 'If the conceded right of way means anything at all, it puts the necessity of continuous observation and avoidance of injury upon the driver of the automobile when approaching a crossing, just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings.' "

The matter of absolute right is not involved here, but only the degree of care exacted.

With reference to the motions, in another aspect it is contended the respondent could not have been injured as he claims, considering other testimony as to the portion of the automobile with which he came in contact in the collision, but without giving the details of it, that was a matter for the jury. Further, it is argued generally that, upon all of the evidence, the motions should have been granted. From the facts already mentioned, the jury had a right to believe that the driver, when it was dark, without lights, at an excessive rate of speed, swerved or came at an angle (as one of the witnesses put it) from near the middle of the street to a point at or near the curb, and ran down the respondent at a time he was undertaking to save himself. There is a dispute whether there was any other traffic on the street at the time of the accident. Altogether the case was one for the jury.

It is further claimed a new trial should have been granted for the reasons: (1) Newly discovered evidence to the effect that the respondent, in 1904, had been convicted of a crime. After that date, and for eleven years, it appears that respondent had been steadily engaged as a street railroad employee in Seattle. This court has held a new trial should not be granted for newly discovered evidence which merely goes to the credibility of the opposite party as a witness, rather than to the right of recovery. *Harvey v. Ivory*, 35 Wash. 397, 77 Pac. 725. "This court has several times held that, where the only purpose of newly discovered evidence is to impeach or discredit evidence produced at the trial, a new trial will be denied." *Orr v. Schwager & Nettleton*, 74 Wash. 631, 134 Pac. 501. See, also, *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233.

(2) That respondent swore falsely about his child.

Dec. 1921]

Opinion Per MITCHELL, J.

He gave no testimony as to the child until on cross-examination he said: "Q. You are a married man, are you? A. Yes, sir. Q. Any children? A. One. Q. How old is the child? A. 11 years old. Q. Living with you? A. No, sir. Q. Where is the child? A. My mother has got her." The affidavit for a new trial showed that the child had been adopted, with the consent of its parents, by the respondent's mother. The matter was incidental, brought out on cross-examination, and the respondent was not questioned with reference to the support of the child.

(3) Instructions to the jury: It is claimed the court erroneously instructed the jury "that by an ordinance of the city, automobiles are required to keep as near the right-hand curb, in the direction in which they are going, as it is practicable for them to drive," because it was not plead in the complaint. But the record shows that the appellants introduced this section of the traffic ordinance in evidence, and clearly the situation at the scene of the accident made the instruction proper. The criticisms made of the court's instructions as to the effect of the respondent's ability to see the automobile, although it was without lights, and the effect or legal consequences of the violation of positive laws as related to the subject of negligence and proximate cause, are made as if those instructions stood alone in the whole body of the law given to the jury. They were only portions of the instructions on the subjects of negligence and proximate cause. The rule requires a consideration of all of the instructions given, and from that view point, in this case, it appears there was no partiality in the instructions nor cause for the claim of errors.

Affirmed.

PARKER, C. J., FULLERTON, BRIDGES, and TOLMAN, JJ.,
concur.

[No. 16707. Department Two. December 22, 1921.]

MARY HAFNER, *Respondent*, v. P. P. FITZPATRICK,
Appellant.¹

NEW TRIAL (34)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DISCRETION. The denial of a motion for a new trial cannot be said to be an abuse of the court's discretion in such matters where the affidavits for and against are flatly contradictory, and when one of the affidavits for a new trial was that of a person who was admittedly a wrongdoer in the subject-matter of the action.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered March 29, 1921, upon findings in favor of the plaintiff, in an action in replevin, tried to the court. Affirmed.

Edward A. Davis and *B. B. Horrigan*, for appellant.

Chas. W. Johnson, for respondent.

PER CURIAM.—This is a replevin action to recover an automobile owned by the respondent. The trial court, on conflicting testimony, found that the automobile was feloniously taken from the respondent's possession by one S. J. Nowland and sold by him to the appellant, and ordered the automobile, or its value, returned to the respondent.

The testimony does not preponderate against the findings of the trial court. As a matter of fact, it is nearly conclusive that the findings are correct.

After the judgment had been entered, the appellant made a motion for a new trial upon the ground of newly discovered evidence, and in substantiation of the motion presented the affidavits of Nowland and others, which contradicted the testimony given on the trial by the respondent and her witnesses. These af-

¹Reported in 203 Pac. 3.

Dec. 1921]

Opinion Per Curiam.

fidavits on behalf of the appellant were controverted by affidavits furnished by the respondent, and upon the consideration of all of them, the trial court denied the motion for a new trial. It is now urged upon us that this is error.

The denying or granting of a motion for a new trial is, to a large extent, in the discretion of the trial court, and we are satisfied that this discretion was wisely exercised in the instant case. Nowland was admittedly a wrongdoer. The trial court was justified in placing little credence in his statements, and in addition, his and the accompanying affidavits were flatly contradicted by counter affidavits.

The court, having heard the witnesses at the trial and being fully conversant with the facts, is in a far better position than this court to determine whether sufficient showing had been made to justify a reopening of the case. We are satisfied that he did not act improperly in disposing of the motion, and the judgment is affirmed.

[Nos. 16479, 16480. Department Two. December 22, 1921.]

ALBERT R. CARLSON *et al.*, Respondents, v. GEORGE W.
HERBERT *et al.*, Appellants.

ETHEL ANNA CARLSON, by Albert R. Carlson, her
Guardian ad Litem, Respondent, v. GEORGE W.
HERBERT *et al.*, Appellants.¹

APPEAL (414)—REVIEW—VERDICT. The verdict of the jury upon conflicting evidence is conclusive on appeal upon all questions properly submitted to the jury.

MUNICIPAL CORPORATIONS (383, 391)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a pedestrian, acting under emergency in seeking to avoid being run over by an automobile, acts as an ordinarily prudent man would under the circumstances, is a question of fact for the jury.

SAME (392)—USE OF STREETS—INSTRUCTIONS. In actions by a mother and a minor child for personal injuries inflicted by defendant, a requested instruction that if the child was in the custody of the mother at the time, and that the accident and resulting injury to the child was the result of the mother's negligence the child could not recover, if conceded to be the law, was properly refused where the evidence showed the negligence of defendant, without contributory negligence on the part of either plaintiff.

TRIAL (35, 38)—SUFFICIENCY OF OBJECTIONS—MOTION TO STRIKE. In an action for personal injuries inflicted on a pedestrian by an automobile, a statement, volunteered by an expert witness on speed, that an automobile could probably be stopped on a slippery street within thirty feet if it had chains on the car, even if not responsive to the question, was not erroneous in the absence of a motion to strike.

MUNICIPAL CORPORATIONS (388)—USE OF STREETS—ACTIONS—ADMISSIBILITY OF EVIDENCE. Where an automobile operator was charged by a complaint in an action for personal injuries with negligently driving his car at a dangerous and unlawful rate of speed, it was not error to admit testimony by a witness qualified as an expert on speed and on stopping cars under varying conditions, that defendant's car could have been stopped within thirty feet if there had been chains on his wheels.

¹Reported in 203 Pac. 30.

Dec. 1921]

Opinion Per HOLCOMB, J.

SAME (392)—USE OF STREETS—ACTIONS—INSTRUCTIONS. In an action for personal injuries suffered as the result of a pedestrian being struck on a city street by an automobile, the court properly charged the jury that "no person driving or operating a motor vehicle should drive or operate the same in any other than a careful and prudent manner, nor at a greater speed than is reasonable and proper, having due regard to the traffic or use of the way by others, or so as to endanger the life and limb of any person."

Appeal from judgments of the superior court for King county, Hall, J., entered December 11, 1920, upon verdicts of a jury rendered in favor of the plaintiffs, in consolidated actions for personal injuries sustained by pedestrians struck by an automobile. Affirmed.

Morris B. Sachs, for appellants.

Glenn C. Beechler, for respondents.

HOLCOMB, J.—Respondents Albert R. Carlson and Ida M. Carlson, his wife, and Ethel Anna Carlson, by Albert R. Carlson, her guardian *ad litem*, brought separate actions against the appellants, George W. Herbert and the Mutual Union Insurance Company, a corporation, alleging, that the defendant Herbert was the owner and operated an automobile for hire as a jitney on the streets of Seattle; that the Mutual Union Insurance Company is a corporation licensed to issue bonds for indemnity and become surety on bonds of the kind sued upon in these actions; that it was surety on Herbert's bond, given and filed pursuant to the laws of Washington; that, on December 10, 1919, between 5 and 7 o'clock p. m., respondent Ida M. Carlson and her daughter, Ethel Anna Carlson, were walking west on the south side of Virginia street, and across Westlake avenue, streets of Seattle, where Westlake avenue intersects with the south line of Virginia street, the child being in the custody of the mother, and in crossing the street, the mother was using due care;

that appellant Herbert drove his automobile carelessly, negligently, at a high, dangerous and unlawful rate of speed, and ran into Ida M. Carlson and Ethel Anna Carlson, and that the collision was without any fault on the part of Ida M. Carlson.

It is alleged that both mother and daughter were injured, and that some of their clothing was damaged. For the injuries to the mother and for medical attention \$625 is claimed, and for damage to her clothing \$125; for the daughter, the father, acting as guardian *ad litem*, demanded \$720 for her injuries, and \$30 for damages to her clothing.

Answer in both cases deny the negligence charges, deny that Ida M. Carlson was using due care, and deny the injuries, damage and loss alleged to have been sustained by the parties.

By way of affirmative answer and affirmative defense, appellants plead contributory negligence of respondent, the mother, as the proximate cause of the accident which resulted in the injuries, loss and damage, if any. By reply, the defense of contributory negligence is denied. By stipulation of the parties, the court ordered the two cases consolidated for trial, and they were so tried. Separate verdicts were returned by the jury, awarding \$750 in each case to respondents.

The first claim of error urged by appellants is upon the refusal of the court to grant their motion, made at the close of respondents' case, for nonsuit and dismissal of the two actions.

It is claimed that the evidence shows that respondent Ida M. Carlson was guilty of negligence in the premises, which was the proximate cause of and contributed to the accident.

As usual in such cases, there is a conflict in the evidence; we are bound, however, to accept the verdict of the jury upon the conflicting evidence as conclusive

Dec. 1921]

Opinion Per HOLCOMB, J.

upon all questions properly submitted to the jury. The facts as shown by respondents are, that the accident occurred between five and six o'clock in the evening on December 10, 1919. Respondent Ida M. Carlson was walking west on the south side of Virginia street and started to cross the intersection of this street with Westlake avenue. She had her infant daughter, five years of age, who is plaintiff in the other consolidated case. Appellant Herbert was driving his car north on Westlake avenue at a speed, as fixed by some of the witnesses, of between twenty-five and thirty miles per hour. The pavement was slippery, being covered with snow and ice. The street "slanted" or sloped somewhat. As he approached respondents at the intersection, Mrs. Carlson, holding her child by the hand, had started from the sidewalk to cross the street. She looked in all directions to see if a car was coming. She did not see the Herbert car when she stepped off the sidewalk. She first caught sight of the Herbert car when he was trying to pass another car, and was coming at such a fast rate of speed that it (the Herbert car) seemed quite a little distance, and she thought she would have plenty of time to cross over, but he came back of this other car and swerved. He swerved first toward the other side of the street, and then swerved toward her. By the other side of the street she meant the west side of the street toward which he first swerved, and then he swerved back toward the east side of the street and struck respondents.

She further testified that, when she first saw Herbert's car, she knew if she went ahead she would get hit, and thought if she stepped back she would miss him, or he would miss her, but he swerved in very close to the curb of the sidewalk that she had just left. The lights on the Herbert car were bright and blinding.

After the collision with respondents, Herbert's car skidded from the southeast corner of the intersection entirely across to the northeast corner, which was shown to be a distance of 145 feet. Mrs. Carlson was dragged or pulled under the car that entire distance, and got out from under the car when it came to a stop. Mrs. Carlson was corroborated by other witnesses, some of whom saw the Herbert car up the street a distance of 125 or 150 feet, traveling very fast, and first swerving toward the center of the street, and then swerving back toward the curb.

Under such circumstances, the law is that, being in imminent danger, an emergency is presented, and whether, under this emergency, the respondent acted with due prudence is, under all of the authorities, a question of fact for the jury. The law does not scrutinize too carefully an act done by one who has been put in a position of danger by the one who inflicts the injury upon him, leaving it for the jury to say, under such circumstances, whether the act in seeking to avoid the danger was the act of an ordinarily prudent man. *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529; *Lindstrom v. Seattle Taxicab Co.*, 116 Wash. 307, 199 Pac. 289.

The court did not err, therefore, in denying the motions for nonsuit and to dismiss the actions, but would have erred had it granted them. And for the same reasons the court did not err in denying the motions for directed verdicts and for judgments notwithstanding the verdicts.

Some argument is made by appellants to the effect that, in view of the court instructing the jury that contributory negligence could not be plead against an infant of the age of five years, the court should have granted appellant's request for an instruction that if

Dec. 1921]

Opinion Per HOLCOMB, J.

the jury should find from the evidence that, at the time and place mentioned, the plaintiff minor child was in the care and custody of her mother, and that at that time the accident and resulting injury were due to the carelessness and negligence of the mother, and was not due to the carelessness and negligence, as plead in the complaint, of the defendants in the case, the verdict should be for the defendants.

This request the court denied for the reason stated that if there was no negligence on the part of defendant Herbert in the action, then there could be no recovery in any event. Upon the evidence in support of the cases of respondents, as summarized herein, the jury resolved them as showing negligence of appellant Herbert.

Appellants concede that we have established the rule that, "Negligence of the parent cannot be imputed to the child in an action brought for the benefit of the child and not for the benefit of the mother," *Gregg v. King County*, 80 Wash. 196, 141 Pac. 340, Ann. Cas. 1916C 135; but contend that none of the cases decided by us have gone so far as to hold that a child could recover in a case in which the negligence of the parent exercising direct and immediate control over the child who was injured in an accident which was caused or contributed to by the negligence of the parent; that, if the parent could not recover for injuries sustained, therefore the child could not be permitted to recover. The court instructed the jury that, in the case of the child's action, Ethel Anna Carlson, she being a child of tender years, to wit, five years of age at the time of the accident, she is presumed in law not to possess discretion, hence she cannot be charged with contributory negligence. Appellants contend that, in view of that instruction, the court should have instructed the jury, as

requested, to the effect that the child should be charged with the contributory negligence of the mother, who had her then in charge.

We feel it unnecessary to pass upon this precise question of law, for the reason that the facts as shown in the case, and as resolved by the jury in favor of respondents, were that appellants were negligent, and therefore no negligence of either plaintiff contributed to the cause of the injury.

Appellants also contend as a ground for reversal that the court committed error in law during the trial of the case, based upon the following:

While Harold Reardon, a witness for respondents, was testifying, he was asked by plaintiff's attorney:

"Q. Were there any chains on the car? A. No, sir; there were no chains on the car at all. If he had chains on, he probably could stop in 30 feet, might be 30 feet. Mr. Sachs: We object to this and ask that it be stricken. There is no ground of negligence alleged in the complaint here charging us with not having chains on the car in the operation of this car. Mr. Beechler: The state law provides that a person has to be careful in driving. The Court: I will overrule the objection."

Exceptions were asked and allowed.

It is true no allegation in the complaint charges the defendants with negligence in operating the automobile without chains. Appellants, however, did not show the entire setting and context of the evidence complained of.

The witness Reardon had qualified to testify as to the speed of cars and of the kind of car operated by Herbert in particular, and in doing so had testified that, under ordinary conditions on a street of the kind in question, when it was dry, and the car going at the rate of twenty or twenty-five miles per hour, it could have been stopped in from twenty to twenty-five feet.

Dec. 1921]

Opinion Per HOLCOMB, J.

He was then asked, "When the street is in a slippery condition such as this street was in, would you say a person would go further before he would stop?" He answered, volunteering the statement: "If he had chains on I don't think he would have." He was then asked if there were chains on the car, and he answered there were no chains on the car. If he had chains on, the car could probably be stopped in thirty feet. The evidence as to the chains was somewhat of the nature of volunteered evidence, not called for by the precise question asked, but if erroneous it should have been stricken on motion of appellants, which was not done.

We do not consider it erroneous, however, for the reason that, although negligence in not having chains was not pleaded by respondents, they did plead that appellant Herbert was driving his automobile carelessly and negligently, at a high, dangerous and unlawful rate of speed, and this witness qualified as an expert on speed, and on stopping cars under varying conditions, and testified that if Herbert had had chains on his car he could probably have stopped in thirty feet. This was merely testifying as to the conditions under which Herbert was operating his car. It was the duty of Herbert, in operating his car, to consider all the conditions under which he was so operating. The street being slippery and the car going at what might have been determined to be a reckless and negligent speed, under these conditions, it was his duty to consider that he could not stop as quickly without chains as he could with chains, and went, therefore, to the question of his carelessness and negligence in operating his car at the speed at which he did operate it under the circumstances shown.

The trial court correctly defined negligence, contributory negligence, and also proximate cause, to the

jury, and instructed them that, "No person driving or operating a motor vehicle should drive or operate the same in any other than a careful and prudent manner, nor at a greater speed than is reasonable and proper, having due regard to the traffic or use of the way by others, or so as to endanger the life and limb of any person," and instructed them as to the speed limit in various sections of the city, and generally upon any street or road in the state of Washington, and that they must find from a clear preponderance of the evidence that, at the time alleged in the complaint, the injuries were sustained by the parties because of the negligence of Herbert, substantially as alleged in the amended complaint; and that they should further find that, at the time alleged, plaintiff Ida M. Carlson was free from contributory negligence. We are satisfied that the jury were correctly instructed as to the law of the cases, and that no error occurred.

The judgments are affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ.,
concur.

Dec. 1921]

Opinion Per HOVEY, J.

[No. 16504. Department Two. December 22, 1921.]

THE STATE OF WASHINGTON, *on the Relation of L. L. Holt, Plaintiff*, v. D. HAMILTON, *Appellant*.¹

QUO WARRANTO (5)—NATURE AND GROUNDS—ELECTION CONTEST—IRRIGATION DISTRICT OFFICERS. Proceedings in quo warranto will lie to oust a director of an irrigation district whose election was secured by the votes of persons not entitled to vote.

WATERS AND WATER COURSES (89)—IRRIGATION DISTRICTS—ORGANIZATION—QUALIFICATION OF VOTERS — STATUTES — CONSTRUCTION. Under Rem. Code, § 6418, any person who has evidence of title to land within an irrigation district, coupled with possession and actual control of the land, is entitled to a vote in the selection of officers to operate the district.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered March 29, 1921, in favor of the plaintiff, upon overruling a demurrer to the petition, in an action in the nature of quo warranto. Reversed.

Chas. W. Johnson, for appellant.

Edward A. Davis and *C. M. O'Brien*, for respondent.

HOVEY, J.—This is a proceeding in quo warranto, whereby the relator, L. L. Holt, seeks to have the respondent, D. Hamilton, ousted of his position as a director of an irrigation district, upon the ground that respondent's election to the office was secured by the votes of certain individuals whose only interest in the land embraced within the district was by reason of certain contracts of purchase held by them.

A demurrer was interposed to the petition, and the same being overruled, the respondent below (being the appellant here) elected to stand upon the demurrer, suffered judgment to go against him, and brings the case here upon appeal.

¹Reported in 202 Pac. 971.

It is first contended that this is in fact an election contest, and under our recent decision in *Whitten v. Silverman*, 105 Wash. 238, 177 Pac. 737, the action will not lie. That was the case of a diking district, and it was there held that the office of a director of such district did not come within the provisions of our statute relative to election contests. The present proceeding is brought in quo warranto and comes clearly within our decision in *State ex rel. Hyland v. Peter*, 21 Wash. 243, 57 Pac. 814.

We come now to consider the qualifications of these voters. The state of California, which was the pioneer in irrigation district legislation, had a statute which limited the qualifications of signers of the original petition to "freeholders owning land." The supreme court of that state, in *Directors of Fallbrook Irrigation District v. Abila*, 106 Cal. 355, 39 Pac. 794, held that a person who held land under a contract from the state had evidence of title, but did not have sufficient ownership to bring him within the qualification of a signer of the petition under the original statute. The legislature of that state had, prior to the decision, amended the law to read: "holders of title or evidence of title," but this was not the one under which the case originated. Our statute of 1889-1890, p. 671, used the word "freeholders." By Laws of Washington 1895, pp. 432 and 433, the present words were substituted, the same being a portion of § 6418, Rem. Code, reading as follows: "Any person . . . who holds title to land or evidence of title to land embraced within the boundaries of any irrigation district . . ."

A copy of the contract, which is alleged in the complaint to be of the same character as all of the other contracts involved, is attached to and made a part of the complaint. It is the ordinary contract for the sale

Dec. 1921]

Opinion Per HOVEY, J.

of real property, with the time essence clause and provisions for forfeiture. It contains provisions requiring the purchaser to improve the land and grow crops upon the same, and expressly requires the purchaser to pay all irrigation district assessments. There is a further provision that the purchaser shall be entitled to keep possession as long as the contract is kept in good standing. We do not think it is necessary to define the legal standing of a contract of this character in all respects. In our opinion, the legislature used the words "evidence of title" for a purpose, and to permit the people who have written evidence of their right to acquire title, coupled with possession and actual control of the land, the people, who are the ones really interested in the proper operation of the affairs of the district and are the ones who have to meet its burdens, to have a voice in selecting the officers to operate the irrigation district.

A case analogous to this is that of *State ex rel. Hall v. Savidge*, 93 Wash. 676, 161 Pac. 471. In that case we held that a person who held a contract of purchase of state land was an owner within the meaning of a statute when it provided that any one desiring to secure the reserved rights of the state in oils, minerals, etc., must first make provision for the payment of damages sustained by the owner by reason of the entry upon the land to exercise the privilege.

Respondent cites *Rothchild Bros. v. Rollinger*, 32 Wash. 307, 73 Pac. 367. The point in question in that case was the number of signers needed, and the question of their capacity was not involved.

The judgment appealed from is reversed, with instructions to sustain the demurrer.

HOLCOMB, MAIN, FULLEBTON, and MACKINTOSH, JJ., concur.

[No. 16723. Department Two. December 22, 1921.]

*ANNA SILLS, Respondent, v. S. J. SILLS, Appellant.*¹

DIVORCE (36)—GROUNDS—EVIDENCE—SUFFICIENCY. A decree of divorce awarded a wife, is supported by evidence that the husband maintained a room in an apartment house owned by him and a former wife, using a kitchen in common with her, and that he had treated plaintiff with some physical violence and called her vile names.

SAME (80)—DIVISION OF PROPERTY—EXCESSIVE AWARD. Where the court had made a fair division of the real property of spouses on decreeing a divorce, an order directing the cancellation of a \$750 note given by plaintiff to defendant prior to their marriage for money borrowed by her to make a property settlement with her former husband from whom she was divorced was excessive, and should be modified by striking the money judgment in favor of plaintiff.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered February 9, 1921, in favor of the plaintiff, in an action for divorce, tried to the court. Modified.

Wm. Sheller, for appellant.

HOVEY, J.—By the judgment of the trial court, the respondent was granted a decree of divorce and an award of certain property out of the separate property of the appellant. Respondent makes no appearance in this court.

The parties intermarried in this state on March 24, 1920, and the action for the divorce was commenced the following October. The respondent is the mother of six children, the eldest being seventeen years of age and the youngest four, all by her former marriage. She has been twice divorced, both times from the same husband. The appellant is fifty-seven years of age and has been married twice before, being divorced from his

¹Reported in 202 Pac. 969.

Dec. 1921]

Opinion Per HOVEY, J.

first wife, and his marriage to his second wife being annulled. At the time of her marriage, the respondent was possessed of real property of the value of about \$7,500, and the appellant was possessed of considerable property, the value of the same being in dispute, the testimony of the respondent showing it to be worth about \$25,000, and that of the appellant that it is worth about \$14,000. As against this, the appellant is indebted in about the sum of \$5,000.

The appellant assigns two errors:

First. That the court erred in finding sufficient grounds for the divorce.

Second. That the court abused its discretion in awarding any of the said property to the respondent.

The evidence shows that the appellant is a man accustomed to business and deals principally in real estate. The parties were well acquainted with each other for several months prior to their marriage, and during all the time the family of respondent resided with her and appellant was well informed as to the obligations which he was assuming. As it often happens in cases where people of mature years marry where one of them has a family of young children, a good deal of irritation and friction developed. The evidence shows that the respondent was a good housekeeper and provided a comfortable home, but that appellant never fully took up his duties as a husband, but spent a large portion of his time in rooms which he maintained in an apartment house belonging to himself and his former wife. This apartment house seems to have been handled by both the appellant and his former wife, and the latter maintained her residence there also, using a common kitchen with the appellant, and appellant kept most of his clothing in the rooms in the apartment house. He was more or less in the company of his

former wife, and while the lower court found there was no evidence showing that their relations were of an improper nature, it is admitted that this conduct was in opposition to the wishes of his present wife and would naturally cause her a great deal of humiliation. The wife testifies that, in the month of August, the appellant awoke her in the middle of the night, treated her with some physical violence, and applied to her some very vile names. The husband denies part of these allegations, but the evidence shows that the parties separated after this, and the lower court found, from certain corroborative evidence, that the wife's story was to be believed, and we think he was justified in so finding. The record contains evidence as to many more matters, but we will not further relate them, as we believe that the judgment of the lower court in granting the divorce is fully justified.

Prior to her marriage, the respondent had contracted to purchase certain property, known as the "Delta property," from the appellant and another man who was a joint owner. The purchase price was \$2,600, and respondent paid on account of the same about \$600. Afterward appellant purchased the interest of his coowner, and in the decree the court awarded the entire property to the respondent. About the time of their marriage, respondent borrowed from appellant the sum of \$750, and gave her note therefor, this money being used by the respondent in a property settlement with her former husband. At the time of the trial, the appellant had pledged this note as security for a loan, and in the decree the court ordered the cancellation of this note, and in case that could not be secured, the decree provides that the respondent shall have judgment against the appellant for the amount of the note. We think that, under the circumstances

Dec. 1921]

Statement of Case.

of the case, the award made to respondent was too large.

In our opinion, the respondent should pay the sum represented by this note, and the decree will be modified to require her so to do, and the provision for the money judgment in favor of respondent will be stricken. In all other respects the decree will be affirmed. Neither party to recover costs.

PARKER, C. J., HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16668. Department Two. December 22, 1921.]

SILER MILL COMPANY, *Appellant*, v. UNITED STATES
SPRUCE PRODUCTION CORPORATION, *Respondent*.¹

UNITED STATES—WAR CONTRACT—CONSTRUCTION—DURATION. Under a contract between the government and a mill company on a 1917 form, reciting commencement of delivery in November, 1917, but which was not signed until April 1, 1918, calling for the delivery of spruce lumber for a period of eighteen months, the mill company is entitled to damages for its cancellation by the government in November, 1918.

SAME—WAR CONTRACT—CONSTRUCTION—SUBJECT-MATTER — QUANTITY. Under the provisions of a war contract for the delivery of spruce lumber to the government for a period of eighteen months at the rate of "about 250,000 feet or more of said spruce during each month," the contract called for a delivery of 4,500,000 feet and not the entire output of the mill; and where it was cancelled after delivery of 3,915,120 feet the government was liable for the profit that could have been made on the balance of the lumber.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered December 22, 1920, upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

¹Reported in 203 Pac. 6.

Shank, Belt & Fairbrook, for appellant.

Carey & Kerr, Omar C. Spencer, and *A. L. Miller*,
for respondent.

MACKINTOSH, J.—A contract was entered into between the appellant and the United States government for the production of spruce lumber, to be used during the world war in the manufacture of airplanes. This contract was subsequently assigned to the United States Spruce Production Corporation, a corporation organized under the laws of the state of Washington. The parties hereto having waived the question of the jurisdiction of the courts of this state over the respondent, and we being satisfied that we have such jurisdiction, only the question of the interpretation of the contract is presented.

So far as material, the contract is as follows:

“Signal Corps United States Army,

“Contract No. SPD—144,

“Order No. ———

“Proposal No. ———

“Req. No. ———

“Contract for Spruce Lumber.

“These articles of agreement, entered into this first day of April, 1918, by and between Siler Mill Co., a corporation organized under the laws of Washington and located at Raymond, Washington, hereinafter called the ‘Seller’ and the United States of America, hereinafter called the ‘Government,’ represented by J. Van D. Crisp, 1st Lieut. Signal Corps, of the United States Army, hereinafter called the ‘contracting officer’ and under the directions of the Secretary of War, witnesseth:

“Whereas, Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States of America and the Imperial German Government, constituting a national emergency, and

“Whereas, on September 7, 1917, under the provi-

Dec. 1921]

Opinion Per MACKINTOSH, J.

sions of Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, the president, acting through the Secretary of War, commanded that all orders placed with the Seller by the Equipment Division of the Signal Corps be fulfilled and required that said Seller proceed with all possible haste with the production of spruce lumber for the manufacture of airplanes in accordance therewith, and with the further requirement that the Seller give preference to such orders over all other orders and contracts of said Seller:

“Now, therefore, under the provisions of said Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, and in accordance with the foregoing command, the President hereby places an order with the Seller with the requirement that it comply with the contract hereinafter set forth, and in consideration of the mutual agreements herein contained, the parties hereto have agreed and by these presents do agree to and with each other as follows:

“Article I. The Seller hereby sells to the Government and the Government hereby purchases from the Seller, in accordance with the terms and conditions hereinafter set forth, four and one-half million feet of spruce lumber within the period of eighteen months next ensuing which shall conform in all respects to the requirements and provisions of Standard Specifications No. 1 hereto attached, or such modification thereof as the Government shall hereafter from time to time adopt.

“Art. II. The Seller agrees to deliver about 250,000 feet or more of said spruce, during each month, commencing with the month of November, 1917, and continuing until the expiration of this contract. Time is of the essence of this agreement, and in the event that for any reason deliveries in any months shall be less than about 250,000 feet, board feet, the Government may elect not to accept any deficiency, but if such election be not made in writing, delivered to the Seller within ten (10) days after the end of the month in which any such deficiency occurs, the deficient amount shall be delivered in the next succeeding months. . . .

“Art. III. Deliveries of said spruce shall be made by the Seller to the Government free on board cars at the mill of production, but if the Government shall notify the Seller within a reasonable time in advance of its intention

“Art. IV. All said spruce lumber to be delivered under this contract shall be inspected at the time of delivery as to compliance with the specifications hereto attached, or such modification thereof as the Government shall adopt, and as to measurement, at the mill of Seller by inspectors authorized by the Government, which inspection shall be final. The Government hereby reserves the right to refuse and to mark the letters ‘C. S.’ in crayon on any spruce lumber found on such inspection not to be in compliance with specifications hereto attached, or such modification thereof as the Government shall adopt

“Art. V. The price to be paid for such spruce lumber to the Seller by the Government shall be One Hundred and Five and No/100 Dollars (\$105) per one thousand (1,000) board feet, based on measurements noted in specifications hereto attached, or such modification as the Government shall adopt

“Art. IX. It is further contracted and agreed that the Seller shall saw, manufacture and deliver the lumber herein contracted to be delivered in a good and workmanlike manner and to the satisfaction of the Government. And if at any time the Government should determine that the Seller is not complying with this clause of the contract, the Government may at once terminate this contract and decline to receive any more lumber from the Seller.”

Upon the cessation of hostilities the respondent cancelled the contract, and this action is brought for damages suffered by reason of such cancellation.

The first contention of the appellant is that the contract is one dating from April 1, 1918, and to extend for a period of eighteen months thereafter; and secondly, that the contract called for the entire output of

Dec. 1921]

Opinion Per MACKINTOSH, J.

the respondent's mill, and was not a contract for merely 4,500,000 feet of spruce. The testimony shows that the appellant was engaged in the manufacture of lumber, and that sometime in the year of 1917, it being then engaged in the production of spruce for the Allies, ceased such production and entered into an arrangement with the United States government to transfer the spruce to it; that the United States government was bending every effort to increase the spruce production, as it appeared that the success of the war might largely depend upon the rapid manufacture of airplanes. About November, 1917, there was sent out to the mills manufacturing spruce printed contracts, a part of one of which is hereinbefore set forth, bearing date of November 1, 1917. This contract was held by the appellant until sometime in March, when it was signed by appellant, and the date of the contract as it appeared in the first line thereof was changed to the 1st of April, 1918, and was approved on March 30 by the government. The date of November, 1917, as it appears in article II remained as it originally appeared. It is to be remembered that, up until the actual signing of this contract, the appellant was furnishing spruce under the arrangement made the preceding summer.

After the making of this contract, the appellant proceeded to carry it out, and in doing so increased the output of its mill, purchased at high prices additional spruce, and did everything that was necessary to comply with the contract, and everything that would be advantageous to the interest of the government in securing the greatest amount of spruce production possible. By the time the contract was cancelled, the appellant was in position to deliver a great deal more than 250,000 feet of spruce per month, and the appellant is claiming damages based upon what it would

have been able to deliver, running at full capacity during the remaining portion of the eighteen months, after the cancellation in November, 1918.

From the 1st of April, 1918, to the time of cancellation the appellant had delivered about 3,915,120 feet of spruce, as appears by its claim filed December 27, 1918, with the Spruce Production Division.

(1) Reading the contract so as to give full effect to all its provisions, and taking into consideration the circumstances under which it was executed, we are clearly of the view that it was a contract calling for the delivery of spruce for a period of eighteen months, following April 1, 1918.

(2) It is equally clear that the contract is one for 4,500,000 feet of spruce lumber only. It therefore follows that, upon cancellation, the appellant was entitled to such damages as flowed from a failure of the respondent to take the additional 584,880 feet.

The testimony establishes that there would have been a profit to the appellant of \$43 per thousand feet on this contract. The appellant was, therefore, entitled to a judgment for \$25,149.84, and the action of the trial court in failing to find for the appellant is reversed, with directions to enter a judgment for the above amount.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

Dec. 1921]

Statement of Case.

[No. 16621. Department Two. December 22, 1921.]

FARMERS MARKET, *Respondent*, v. IDA AUSTIN *et al.*,
Appellants.¹

CORPORATIONS (178)—CONTRACTS—NOTICE OF AUTHORITY OF OFFICER TO PERSON DEALING WITH CORPORATION. Where a debtor gives a check executed in the name of a corporation, by himself as manager, to his individual creditor in payment of a debt, such creditor, having parted with nothing of value in reliance upon any act of the corporation, is chargeable with notice that the manager had no authority to pay his private debt, and cannot defeat action for recovery of the amount on the theory of being an innocent third party.

ASSIGNMENTS (15)—EQUITABLE ASSIGNMENTS—LOSS OR INJURY TO DEBTOR. Although a corporation is indebted to its general manager, the execution of a check of the corporation by himself as manager in payment of his private debt does not constitute an equitable assignment, where such check is only part of an entire transaction whereby the corporation is deprived of an amount in excess of its indebtedness to him.

CORPORATIONS (165)—REPRESENTATION—RATIFICATION. Where a corporation repudiates the act of its general manager in executing a corporate note in payment of a private debt as soon as it has knowledge of the act, it cannot be said to have ratified the act.

SAME (165). The right of action of a corporation against a person to whom its agent had wrongfully paid corporate money is not waived by any election of remedies against such agent in an effort to recover the money.

HUSBAND AND WIFE (84)—COMMUNITY PROPERTY—LIABILITY OF WIFE—IMPLIED CONTRACT. Where money of a corporation is applied by an agent to the wrongful payment of his private debt to a married woman, her liability for the repayment of the money to the corporation arises on an implied contract for money had and received, and not for a tort, and the community of husband and wife is liable therefor.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered March 15, 1921, upon findings in favor of the plaintiff, in an action for money received, tried to the court. Affirmed.

¹Reported in 203 Pac. 42.

Louis A. Dyar, for appellants.

King & Kerr, for respondent.

MACKINTOSH, J.—One Wallace was the general manager of the respondent, and on April 1, 1920, he loaned to his employer the sum of \$1,000, which was placed to its account and for which he took a promissory note, payable on June 1, 1920. The note was not paid, and on June 23 he gave to the appellant a check on the respondent's account in the sum of \$500, to pay a private debt owing by him. The check was signed in respondent's name by Wallace, as manager, and on the same day Wallace wrongfully took \$845 from the respondent's place of business and quit his employment, leaving also an unpaid balance on open account due respondent of \$216. The respondent made demand upon the appellants for the return of the money received by them, but they refused it, and this suit was instituted for the purpose of recovering it. The respondent thereafter assigned its claim against Wallace for collection, and suit was brought against him for a sum which included the amount paid to Mrs. Austin. The lower court found that Mrs. Austin received from Wallace, as agent of the respondent, and appropriated, the sum of \$500 of the respondent's money in payment of a private debt of Wallace, with notice that the money was the money of the respondent. The evidence amply sustains these findings.

The appellants in opening their argument state:

“The general rule permitting a principal to follow trust funds in the hands of a holder with notice, where such funds have been used by the agent to pay a private debt, is not disputed. It is also admitted that the check received by Ida Austin, signed Farmers Market by W. C. Wallace would be sufficient to put her on inquiry.”

Dec. 1921]

Opinion Per MACKINTOSH, J.

But they then contend that the appellants should succeed in this action upon equitable principles, for the reason that Mrs. Austin was an innocent third party, and that it was the duty of the respondent to apply the \$1,000 indebtedness to Wallace in satisfaction of the check received by her. As we view the case, it does not call for the application of any such equitable rule as contended for. At the time Mrs. Austin received the money, she was charged with notice of the fact that Wallace had no authority to pay his private debt with money belonging to his employer. This notice was especially called to her attention by the fact that the check upon which she received the money was drawn in the respondent's name. As a matter of fact, she made no inquiry to ascertain whether Wallace had any authority to issue such a check. She parted with nothing in reliance upon any act of the respondent, and if there are any equities in the case they would seem to be in favor of the respondent. As was said in the case of *People's National Bank v. Myers*, 65 Kan. 122, 69 Pac. 164:

“One who, through the design or misdirection of another, receives money which he knows belongs to a third person, cannot retain it for application on his own debt, due from the one who designedly or mistakenly gave it to him. This proposition seems so evidently equitable as not to require argumentation.”

Nor is there any merit in the contention that the giving of this \$500 check to Mrs. Austin was an equitable assignment of the indebtedness of the respondent to Wallace, for the reason that the giving of the check was only one part of an entire transaction which resulted in depriving the respondent of an amount clearly in excess of the indebtedness of the respondent to Wallace.

Nor was the act of Wallace ratified by the respondent, as there was no act on the part of the respondent to show an intention, either express or implied, to ratify such act; on the contrary, as soon as it had knowledge of the act of Wallace, the respondent sought to repudiate it. *Merchants' Bank v. Superior Candy etc. Co.*, 41 Wash. 653, 84 Pac. 604.

Nor can the appellants succeed upon the theory that the respondent has waived the tort of the agent. The liability of one who has received a principal's money wrongfully is not to be measured by what the principal may do in the election of remedies against the agent seeking to recover the money.

It is finally urged that the judgment is erroneous in that it is against the community consisting of Mrs. Austin and her husband. It is urged that Mrs. Austin was guilty of a tort, and the community is not bound by the wife's tortious act. The liability of Mrs. Austin is not based upon a tort, for as was said in her own brief, she is a person "not charged with fraud or bad faith," but her liability which the law imposes upon her to repay the money arises on an implied contract for money had and received. It having been found by the trial court that the money was received for the benefit of the community, judgment against the community was correct.

Judgment affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

Dec. 1921]

Opinion Per MACKINTOSH, J.

[No. 16376. Department Two. December 22, 1921.]

J. R. FRYE, *Respondent*, v. C. E. BLACKWELL & COMPANY, *Appellant*.¹

APPEAL (418)—REVIEW—FINDINGS. Where the evidence does not clearly preponderate against a finding of the trial court, the finding will be acquiesced in by the supreme court on appeal.

MASTER AND SERVANT (17)—WORK AND LABOR (15)—ACTION FOR WAGES—CONTRACT—DURATION OF TERM—AMOUNT OF RECOVERY. Under a contract of employment for an indefinite period, to be compensated by a stated salary per month and in addition by a certain percentage of the profits, where the employee is compelled to abandon the employment by reason of sickness, he is entitled to a pro rata share of the profits of the business during the period he actually served.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered November 13, 1920, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

William O'Connor, for appellant.

P. D. Smith and *W. C. Brown*, for respondent.

MACKINTOSH, J.—The evidence in this case satisfactorily sustains the findings of the trial court, to the effect that, for a long time prior to January 1, 1917, the respondent had been in the employ of the appellant at a salary of \$125 per month; that sometime in December, 1916, a new contract of employment was made between them, by the terms of which respondent was to manage one of the appellant's stores, situated at Okanogan, and was to receive as compensation \$100 per month and twelve and one-half per cent of the net profits of such store; that the respondent fulfilled the terms of his employment and discharged his duties un-

¹Reported in 203 Pac. 5.

til June 10, 1917, when he was compelled to give up his new position by reason of a nervous breakdown; that, from January 1 to the time respondent was so compelled to give up his position, the appellant had advanced to the respondent \$25 a month on the twelve and one-half per cent profit provision of the contract, in addition to the payments of \$100 per month, and the respondent had received altogether the sum of \$541.33. It further appears that appellant suffered no damage or inconvenience by the respondent's leaving its employment, and that, although the business of the appellant during January and February is usually poor, it begins to revive in March, and that the business in the months of April, May and June is the best of the year. The court further found that, at the time this contract was entered into, there was no agreement that the respondent should remain in the appellant's employ for any definite time, but that both parties contemplated that the employment would extend over an indefinite period. It is over this finding that the principal controversy on this appeal has taken place.

Although the testimony is in conflict upon this point, the appellant testifying that the employment was for a year, and the respondent testifying that the employment was indefinite in term, the trial court having found in favor of the respondent's contention, we feel constrained to acquiesce in the finding, as the evidence does not clearly preponderate against it. The materiality of the term of the employment arises from the question it involves of the measure of damages applicable in contracts of employment terminated by the sickness of the employee. It is conceded by the appellant that in contracts of employment for an indefinite period, so terminated, the recovery of the employee is

Dec. 1921]

Opinion Per MACKINTOSH, J.

upon a pro rata basis, the appellant stating its position in its brief as follows:

“If the finding of the lower court is correct that the contract was for an indefinite period and that the plaintiff should remain in the employ of the defendant indefinitely, and the contract between the plaintiff and the defendant was made upon that basis and the plaintiff was to receive as his salary \$100 per month and 12½ per cent of the profits of the store on that basis, then the finding that the defendant is entitled to share pro rata in the net profits is correct. On the other hand, if plaintiff was not employed for an indefinite period, but it was understood that plaintiff was to stay a year and the plaintiff quit his employment by reason of ill health, he would not be entitled to recover upon a pro rata basis but could only recover upon a quantum meruit.”

The respondent claims there is no difference in the measure of recovery in employment for definite or indefinite periods, and quotes the following extract from the opinion of this court in *MacFarlane v. Allan-Pfeiffer Chemical Co.*, 59 Wash. 154, 109 Pac. 604, Ann. Cas. 1912A 1180, 28 L. R. A. (N. S.) 314:

“Under the old common law rule, when the servant was employed for a fixed time, the contract was considered as an entirety, and no recovery could be had except for complete performance. The rule was early modified by the American courts, and it was held that, when, because of sickness or other reason not the fault of the servant, he was unable to continue in his employment, he could nevertheless, recover *pro rata* for the service actually performed, less any damage caused by reason of failure of complete performance.”

Although we have determined in this case that the employment was for an indefinite time, and the question of the measure of damages in cases of employment for a definite period is not before us, yet we think it proper to refer to the language just quoted from the

MacFarlane case, for the purpose of saying that that language was not material to the point before the court and is therefore dictum, and we leave open the question of whether, in any event, it correctly states the rule of law.

The appellant's Okanogan store made a net profit in the year 1917 of \$9,500, and the pro rata share for four and one-third months during which the respondent was in the appellant's employ (the month of February being eliminated for the reason that the respondent was absent on personal business of his own during that month) would amount to \$438.78, which would leave a balance to respondent of \$330.45, which was the amount of the judgment awarded him, and from which the appeal was taken.

The judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16747. Department Two. December 22, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. CHAS. BUTTIGNONI, *Appellant*.¹

CRIMINAL LAW (460)—PUNISHMENT—SUBSEQUENT OFFENSES—STATUTES—CONSTRUCTION. Laws 1917, p. 61, § 15, amendatory of § 32 of the initiative measure against the sale of intoxicating liquors (Laws 1915, ch. 2, p. 2) which prescribes a punishment for every person convicted a second time of a violation of any of the provisions of "this act," contemplates convictions under the prior act, since the two acts are to be construed as one act covering the same subject-matter.

SAME (460)—PUNISHMENT—SUBSEQUENT OFFENSES—PRIOR CONVICTION—EFFECT OF STATUTE OF LIMITATIONS. The fact that the statute of limitations had run against an offense for which one had been convicted would not affect the power of the court to impose

¹Reported in 203 Pac. 76.

Dec. 1921]

Opinion Per MAIN, J.

increased punishment for a second violation of the act, as the penalty is not imposed for the prior conviction, which is merely an element of aggravation of the last offense.

SAME (333)—VERDICT—FORM—SEPARATE VERDICTS. Two verdicts returned into court at the same time, one finding the defendant guilty of the crime charged and the other finding the fact of a prior conviction, is in no way prejudicial to the rights of defendant.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered June 6, 1921, upon a trial and conviction of the unlawful possession of intoxicating liquor. Affirmed.

Geo. E. Canfield, for appellant.

C. R. Hadley, for respondent.

MAIN, J.—The defendant was charged by information with the crime of having in his possession on December 31, 1920, intoxicating liquor other than alcohol. The trial resulted in a verdict of guilty, and the defendant prosecutes this appeal.

The information, after charging the crime above mentioned, recited that, on September 17, 1916, the appellant had been found guilty of unlawfully selling intoxicating liquors. The crime charged in the present case is under § 11, ch. 19, p. 60, Laws of 1917. The prior conviction of the appellant, that of selling intoxicating liquor, was had under initiative measure No. 3, Laws of 1915, ch. 2, p. 2. Section 15, p. 61, Laws of 1917, amends § 32 of initiative measure No. 3 (Laws of 1915, p. 16), and provides that "every person convicted the second time of a violation of any of the provisions of this act, for which the punishment is not specifically prescribed, shall be punished" as therein provided. It is first contended that "this act" refers to prior convictions under the act of 1917, and does not refer to convictions under initiative measure No. 3. The title

of the act of 1917 recites, among other things, that it is an act relating to intoxicating liquors and repeals certain sections of initiative measure No. 3, and further amends that act by adding new sections. Throughout the body of the act it purports to be nothing else than an amending and repealing act, and that it further amends initiative No. 3 by adding sections thereto. The section in which "this act" occurs is expressly an amendment of § 32 of initiative measure No. 3, which was very similar in its terms to the later act. It is plain that the legislature, using the expression "this act," did not refer to the act of 1917 as a separate and independent measure, but thereby referred to initiative measure No. 3, as amended by that act. With this construction, the provision calling for a heavier penalty upon a second conviction would include a prior conviction under initiative measure No. 3.

The second point is that the statute of limitations has run against the crime which was committed by the selling of intoxicating liquors in September, 1916, and therefore it could not be an element in the present conviction. In this case the defendant was not convicted of the act done in 1916. The information recited that conviction and the evidence sustained the jury's finding upon it. In *Hyser v. Commonwealth*, 116 Ky. 410, 76 S. W. 174, upon this question it is said:

"The increased punishment is not for the former offenses, but the previous convictions merely aggravate the last offense, and add to its punishment. The accused is not required to answer to the former charges and defend against them. Nothing is heard in reference to the former trials save the fact of conviction."

In *State v. LePitre*, 54 Wash. 166, 103 Pac. 27, with reference to the habitual criminal statute, it was said:

"It does not inflict a double punishment for the same offense, or inflict a cruel or unusual punishment, or

Dec. 1921]

Opinion Per MAIN, J.

impose a penalty for crimes committed outside of the state. It merely provides an increased punishment for the last offense.”

Whether the statute of limitations had run against the prosecution of a crime committed in 1916 is immaterial, as the appellant was not charged or prosecuted for that crime. It was a fact which it was necessary to allege, and necessary for the jury to find, as a basis upon which the increased penalty would be inflicted for the second and subsequent offense.

The last contention is that a new trial should be granted because the jury returned two verdicts, one finding the appellant guilty of the crime charged, and the other finding the fact of the prior conviction. It is the appellant's contention that these two findings should have been embodied in the same verdict. The two verdicts were returned into court at the same time, and whether they were separate or combined could not in any possible way prejudice the appellant. There is no merit in this contention.

The cases of *State v. Sanford*, 67 Conn. 286, 34 Atl. 1045, and *Hyser v. Commonwealth*, *supra*, are not out of harmony with the holding above indicated, to the effect that a conviction in 1916, under initiative measure No. 3, may be used as sustaining the increased penalty provided for second offenses under the act of 1917. In the *Sanford* case, the court was construing the statute of the state of Connecticut and held that, by the terms of the act, it did not refer to offenses committed before it went into effect. The question whether a prior conviction could be used for the purpose of increasing the penalty when a second similar conviction occurred under a subsequent statute was not there passed upon. In the *Hyser* case, the court was construing a statute of the state of Kentucky and held

that the words there used, "second or any subsequent conviction," referred to a conviction of the accused for an offense against the statute committed after his conviction for a previous like offense. Neither of the cases is applicable in the present case if, as we have construed it, "this act" refers to initiative No. 3 as amended, and does not refer to the act of 1917 as a separate and independent statute.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16620. Department Two. December 29, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD
HART, *Appellant*.¹

HOMICIDE (10)—ASSAULT WITH INTENT TO KILL—EVIDENCE—SUFFICIENCY. A conviction of the crime of assault in the first degree is sustained by evidence that defendant borrowed a shot gun after endeavoring in five different places to secure one; that he sought out the prosecuting witness, and, finding him at home on his front porch, fired at him from a distance of seventy-two to ninety-seven feet, with a load of bird shot which lodged in the arm and hip of his victim.

CRIMINAL LAW (155)—OPINION EVIDENCE—TESTIMONY OF MEDICAL EXPERT—ADMISSIBILITY. In a prosecution for assault with homicidal intent, the expert opinion of a physician that, if the shot had struck the body instead of the arm, they could have penetrated the body and entered a vital organ, was admissible in evidence.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered December 20, 1920, upon a trial and conviction of assault in the first degree. Affirmed.

F. A. Kern, for appellant.

C. R. Hadley and *E. K. Brown*, for respondent.

¹Reported in 203 Pac. 4.

Dec. 1921]

Opinion Per MACKINTOSH, J.

MACKINTOSH, J.—The appellant was charged with, and convicted of, the crime of assault in the first degree, as the result of firing bird shot into the arm and thigh of A. L. Olds.

He is not satisfied with the result of his trial and desires to have another chance to present his case to a jury, and to obtain that result, presents two reasons: The first concerns the sufficiency of the evidence to justify a verdict of assault in the first degree. Although he admits that, having been compelled to abandon his castigation, he became annoyed at Olds and had made an endeavor, at at least five different places, to secure a shotgun, and had finally borrowed one, and stealthily sought out his victim, whom he found on his, Olds', own front porch, and had fired at him from a distance of seventy-two to ninety-seven feet, yet he urges upon us that the element of "intent to kill" was not established; in fact, was negatived by his failure to try to borrow either a rifle, revolver or razor, by his purposely having chosen bird shot instead of buckshot to perforate his colored brother; by not having gone closer to do the shooting when he could have done so, and by the shot only lodging in arm and hip. Of course, death not having resulted from appellant's assault, the duty was on the state to prove homicidal intent. *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; *State v. Williams*, 36 Wash. 143, 78 Pac. 780. But it appears to us that all the conduct of the appellant, and the circumstances as shown by the evidence, gave the jury adequate reason for determining that the appellant's heart was set upon slaughter, and the less serious consequences of his act was the result of the necessities of the occasion, rather than of the appellant's fine feeling and kindly consideration.

The second reason advanced by appellant is much

like the first. It questions the admissibility of the testimony of the surgeon called by the prosecution, as follows:

“Q. From your examination of Mr. Olds and the actual facts that existed there as to the distance in which these bullets had penetrated, the depth, are you prepared to say whether or not had those bullets struck the body instead of the arm they could have penetrated a vital part of the body? Mr. Kern: I don't think this is a question for expert testimony; it is the question that the jury has to pass upon as to the intent back of this thing. The Court: I will overrule the objection; exception allowed. A. I think they could have, yes. Q. You think they could have what? A. Penetrated the body and entered the vital organs.”

The claim is that this is not a matter for expert opinion. What is and is not admissible from the mouths of experts cannot be defined by any hard and fast general rule, as there are numerous matters which, while they are in a degree known to many, cannot be said to be so commonly understood that all men can be presumed to draw reasonable inferences therefrom. It would seem that here the doctor, from his training, was better able than a layman to determine whether a vital organ could have been penetrated by the use of appellant's weapon, either from the consideration of the construction of the human body, or from the consideration of the direction that the shot entered it. This evidence was proper as in aid of the establishment of the intent of the appellant.

Finding no reason for disturbing the judgment of the superior court, it is affirmed.

PARKER, C. J., MAIN, HOVEY, and HOLCOMB, JJ., concur.

Dec. 1921]

Opinion Per MACKINTOSH, J.

[No. 16641. Department Two. December 29, 1921.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v.
FRANKLIN COUNTY *et al.*, *Respondents*.¹

TAXATION (205, 211) — EXCESSIVE ASSESSMENT — REDUCTION — TENDER OF TAX—PENALTY — STATUTES. Where a taxpayer has tendered the full amount of tax assessed against his property, with the exception of a special road tax, within the time entitling him to a three per cent rebate under the statute, which tender was refused by the county because it did not include the road tax, on the acceptance of the tender by the county on a later date, the taxpayer is not chargeable with interest on the amount of the tax because it had not actually been paid within the statutory time.

SAME (205, 211)—EXCESSIVE ASSESSMENT—TENDER OF TAX—PAYMENT—RIGHT TO DISCOUNT. Under Rem. Code, § 9219, allowing a rebate of three per cent for the payment of taxes in one payment on or before March 15th, a tender of the amount due prior to that date, except road taxes, which were contested, which tender was refused because road taxes were not included, entitles the taxpayer to the three per cent rebate on the acceptance of the tender by the county at later date, although the validity of the road tax had been confirmed by the courts.

Hovey, J., dissents.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered April 4, 1921, upon sustaining a demurrer to the complaint, dismissing an action to compel the acceptance of a tax. Reversed.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and C. A. Murray, for appellant.

C. M. O'Brien, for respondent.

MACKINTOSH, J.—The appellant prosecuted an action which is reported in *Spokane, Portland & Seattle R. Co. v. Franklin County*, 106 Wash. 21, 179 Pac. 113, against the respondents, seeking to have declared void the road tax levied against its property in road district No. 1,

¹Reported in 203 Pac. 27.

Franklin county, for the year 1917. Before March 15, 1918, the appellant tendered to the respondent county treasurer the entire amount of its taxes for the preceding year, except the road tax in controversy. The tender was "made unconditionally and without prejudice to the right of the county to claim or recover any additional sum appearing from the tax rolls to be due." The tender was refused, the reason given being "that the amount tendered was not equal to the amount of taxes extended upon the rolls of said county against said property." The amount tendered was the entire amount as it appeared upon the tax rolls, except the road tax in controversy, less three per cent discount for payment prior to March 15. On September 19, 1918, by virtue of a stipulation, the treasurer accepted the tender upon the terms which had originally been made. The litigation involving the road tax terminated in a decision confirming its validity. The county now claims penalty on the amount tendered from June 1, 1918, to the date of its acceptance of the amount, to wit, September 19, 1918, and also denies the right of the company to the three per cent discount. This action was brought for the purpose of compelling the county to issue a receipt in full for the taxes of 1917, and a demurrer being sustained to the complaint, the railroad company has appealed.

Section 9219, Rem. & Bal. Code, provides for the method of the payment of taxes, in that taxpayers may pay one-half of their taxes on or before the 31st of May, and in that event the remaining one-half may be paid on or before the 30th of November, and provides further that there shall be an allowance of three per cent rebate to taxpayers who pay all of their taxes in one payment, on or before the 15th day of March. Sections 955 and 956, Rem. & Bal. Code, relate to the

Dec. 1921]

Opinion Per MACKINTOSH, J.

method of contesting taxes and provide that, before any person may begin an action to enjoin the collection of taxes he shall pay or tender "all taxes . . . justly due and unpaid," and must allege compliance with this provision in his complaint. The principal intent of the statute is that, in cases where a taxpayer is making a *bona fide* contest against his taxes, or a portion of them, that he must, before instituting that action for the cancellation of the taxes which he claims are illegal, pay the taxes about which he is making no contest, and if this is his duty, it is certainly the duty of the county to accept the taxes so tendered, and the payment thus received absolves the taxpayer from any penalty upon that amount. If the taxpayer is successful in his litigation, of course his taxes have been paid in full; if he is unsuccessful, he is then compelled to pay not only the amount of the taxes unpaid, but the penalty thereon for failure to pay within the time prescribed by law. So, in either event, the county receives the full benefit which the law gives it in the collection of its revenue. When the appellant here tendered to the county treasurer the amount of the undisputed taxes it was the duty of the treasurer to accept that amount, and his failure to do what the law imposes upon him cannot result in penalizing the appellant. The tender which was made on March 15, 1918, was in effect a payment on that date, and the county has been deprived of the use of the money from that time until it finally accepted it, not through any fault of the appellant, but through its own mistaken judgment. Of course, the tender to have the effect of payment must be an unconditional tender, and such it was in the case before us.

Likewise the appellant is entitled to the three per cent discount for payment prior to March 15, for at

that time it did everything that the law required it to do in order to entitle it to a discount, for it then paid the full amount of its taxes, less the road tax, which was contested, and had it been successful in its contest, it would have a right to the three per cent discount; being unsuccessful, the penalty attaches to the amount it contested, and which was finally declared to be due, but cannot attach to the amount which it paid within the statutory time to entitle it to the rebate. The reasoning in the case of *State ex rel. First Thought Gold Mines v. Superior Court*, 93 Wash. 433, 161 Pac. 77, cited by counsel, bears out the conclusion to which we have arrived. The statement in that case, "when a taxpayer contests the whole of a tax as illegal, and the court finds that it is valid *in toto*, he is bound to pay the statutory penalty", manifestly does not relate to a case such as the one here, where the taxpayer has tendered a portion of the taxes and is only contesting the balance upon which he must pay the penalty in the event of his litigation being unsuccessful.

The lower court was in error in sustaining the demurrer. The judgment is reversed with instructions to overrule the same.

FULLERTON, MAIN, and HOLCOMB, JJ., concur.

HOVEY, J. (dissenting in part)—I concur in reversal as to the twelve per cent interest, but believe credit should not be allowed for the three per cent. The former is a penalty, the latter is allowed in lieu of interest for the use of the money. The plaintiff has the use of the money—not the county.

Dec. 1921]

Statement of Case.

[No. 16740. Department Two. December 29, 1921.]

CATHERINE P. SADLER, *as Administratrix etc.*,
Respondent, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Appellants*.¹

RAILROADS (66)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. While it is a general rule that the contributory negligence of one riding as a guest in an automobile is a question for the jury in case of personal injuries resulting from a collision, yet where the evidence conclusively shows the guest guilty of such negligence, he or his personal representative should be nonsuited.

SAME (66). Where an automobile truck was approaching a railroad crossing at a speed of three miles an hour, and a passenger riding as a guest on the side from which a railroad train was approaching could have had an unobstructed view of the train for the distance of a thousand feet and could have warned the driver to stop in good time or could have left the truck, he was guilty of such contributory negligence as to preclude recovery by his personal representative for his death.

SAME (66). One operating a train has a right to assume that a person approaching the track in an automobile will use reasonable care for his own protection, and will also give the train the right of way to which it is entitled under the law; and the operator of the train is not required to limit the speed or stop until it is apparent that those in the automobile about to cross the track are not aware of the approach of the train, or do not intend to give it the right of way.

SAME (66). The duty imposed upon railway companies of giving signals on approaching highway crossings and of limiting their speed within city limits does not relieve the driver of a machine or his guest of the duty to use reasonable care; and where a guest of the driver could have seen or heard the approach of a train in time to save himself, his personal representative cannot recover for his death, even if the train failed to signal its approach or was exceeding the speed limited by city ordinance.

Appeal from a judgment of the superior court for King county, Hall, J., entered June 24, 1921, upon the

¹Reported in 203 Pac. 10.

verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

C. H. Winders, for appellants.

Charles E. Congleton (*George F. Hannan*, of counsel), for respondent.

HOLCOMB, J.—This is an action for the alleged wrongful death of James Sadler, who was a guest in an automobile truck operated by Arthur Ball, and which was struck by a passenger train operated by appellants, within the city limits of Seattle, at a grade crossing known as Spokane avenue, about 4:15 p. m., June 29, 1920.

The deceased was riding on the right-hand and north side of the seat, with the driver and the driver's son, who was in the middle of the seat. The driver, Ball, occupied the left-hand seat.

Spokane avenue runs east and west and crosses the Northern Pacific main line tracks, running north and south, at about right angles. The train which collided with the truck was a passenger train leaving the Union passenger station in Seattle and running southerly. The Ball truck was going westerly. From the east of the railroad grade Spokane avenue is built upon tide flats, and for a distance of about a quarter of a mile there was no obstruction of any kind to prevent a view of the railroad tracks to the north for quite a distance east of the crossing. A building, about one thousand feet north of the Spokane avenue crossing, known as the Star Machinery building, is the first building to obstruct the view of the railroad track to one approaching for several hundred feet from the east. Horton street is the first street which is opened and traveled to the north of Spokane avenue. The Star Machinery

Dec. 1921]

Opinion Per HOLCOMB, J.

building is constructed adjacent to the south line of Horton street.

On the day in question, Spokane avenue, for quite a distance east of the railroad tracks, was rough and in bad condition, the former trestle which had supported the roadway having burned, and the right of way consisting at that time of boards laid on a sawdust fill. For about one hundred feet the roadway of Spokane avenue went up a slight incline to reach the level of the railroad tracks. About the time of the accident, there had been a fire in the sawdust fill on the east side of the railroad tracks to the north of Spokane avenue, and there were a number of firemen in the vicinity at the time. The fire had been put out, but there was some hose upon the plank roadway, and Captain Boyle of the fire department was relaying machines along that part of the roadway, and at the time the Ball truck approached, four automobiles had been stopped at distances of from one hundred to one hundred and fifty or two hundred feet from the railroad track, he (Captain Boyle) standing about one hundred feet east of the track. The first of these machines got over some time before the accident. The second was driven by one Griffiths; the third driven by Ball (the car which was struck), and the fourth driven by one Wright. This witness testified that he saw the train approaching when it was back about one thousand feet from the point of accident, and that there was nothing which would obstruct the vision of any one approaching the track from the east for a minimum distance of at least one thousand feet. Ball himself testified that, about the time he passed Captain Boyle about one hundred feet from the track, or at the least seventy feet, he looked in a northerly direction, where he could see a thousand feet, and saw no train ap-

proaching from that direction, and then went forward and did not make any further observation in that direction; that, if he had looked, there was nothing to prevent him, and nothing to prevent Sadler, who was on the side nearest the train, from seeing the train for about one thousand feet. His car was moving at the rate of about three miles per hour, and up a slight incline, and could have been stopped almost instantly. Wright, who was driving the automobile immediately following Ball's, testified that he looked up and saw the train when it was back one thousand feet, and did not attempt to cross the track. At that time Ball was back over fifty feet from the point of the accident. Captain Boyle testified that he heard the train whistle and looked up just after Ball passed him, and the train was then back over a thousand feet.

The complaint alleges negligence on the part of appellants in four particulars: (1) that the train was operated at an excessive and unlawful rate of speed, in violation of the ordinances of the city of Seattle; (2) that the train crew gave no warning of its approach, either by bell, gong or whistle; (3) that appellants failed and neglected to keep a proper lookout for traffic; and (4) that appellants failed to keep a watchman at the crossing.

In the instructions the court withdrew from the consideration of the jury the allegations as to negligence in failing to keep a proper lookout and in failing to have a watchman at the crossing, there being no evidence in support thereof.

The automobile in question was a touring car made over into a truck, with one seat, and no curtains on either side to obstruct the view.

Sadler was a working man, working in the vicinity of the Spokane avenue crossing, and when Ball had

Dec. 1921]

Opinion Per HOLCOMB, J.

finished taking on some furniture at the plant of a furniture factory in the vicinity of this crossing, Sadler went up to him and asked him for a ride into town in the truck, which was granted. Sadler never owned an automobile nor operated one, and did not know how to operate one. Ball had never been over this part of Spokane avenue before and was not familiar with it. There was, however, a cross-arm sign at the crossing showing that it was a railroad crossing, and the tracks were in plain view.

There was testimony that the train consisted of an engine, mail car, and three coaches, and was going at a speed variously estimated at from thirty-five to fifty miles per hour, and running very smoothly. It must be noted, however, that it made sufficient noise for other persons in that vicinity to hear it by its rumbling. There is a conflict in the evidence as to whether the bell was rung or the whistle blown as the train approached this crossing, but there is no dispute of the testimony of the fireman that the whistle was blown at Horton street, about one thousand feet away. Ball testified that he did not hear the roar of the train, the bell, or the whistle; that the first he knew of the approach of the train was when it was almost upon him; that he did not ask Sadler to look or listen or take any precautions; that Sadler did not tell him that the train was coming, or say anything; that there was nothing to prevent Sadler from seeing the train for some distance, and that the train came from the side upon which Sadler was sitting.

Ordinance No. 38,045 of Seattle was pleaded by respondent, and is as follows:

“Locomotive and Cars, Speed Limit. Sec. 101. It shall be unlawful for any person having control of the running or drawing of any cars by any steam locomotives, or the control or running of any steam locomotive

alone, to allow or permit the same to go or move along, over or across the surface of any public place, or at any place south of Denny Way and north of Hanford street at a greater rate of speed than six (6) miles per hour.”

Appellants moved to strike the pleading of this ordinance prior to the trial, which was denied by the court, and objected to the introduction of the ordinance as evidence at the trial, which objection was overruled.

Appellants pleaded affirmatively contributory negligence on the part of both Ball and deceased, Sadler, which affirmative allegations were put in issue by denials.

Appellants, at proper times, moved that a verdict be directed, that judgment be entered for them, and after verdict and judgment, moved for judgment n. o. v., and also for a new trial.

Twenty errors are alleged by appellants, but the principal questions involved are the questions of whether Sadler was guilty of contributory negligence, as a matter of law, and whether the court submitted proper instructions upon the evidence in the case, and whether the court erred in admitting the ordinance of Seattle which was pleaded.

It is first contended that there is no evidence of negligence sufficient upon which to justify the submission of the case. The court apparently let the case go to the jury, as far as negligence on the part of appellants goes, under the allegations, first, as to failure to give proper warning signals; and second, as to violation of the ordinance pleaded.

Laying all other propositions to one side, and assuming that the negligence of appellants was shown, we first discuss whether the contributory negligence of the deceased was conclusively established as the proximate cause of the sad accident.

Dec. 1921]

Opinion Per HOLCOMB, J.

Upon that proposition appellants admit the rule, well established in this state, that the negligence of Ball, the driver, could not be imputed to Sadler, a guest in the automobile; but insists that it was as much the duty of Sadler, the guest, to exercise ordinary care and prudence in protecting himself from threatened dangers as for the driver of the automobile; and this is true. The question is whether or not it was a question solely for the jury, or whether the contributory negligence of Sadler was so conclusively shown as to make it a pure question of law for the court.

A great many cases have been cited, and more can be cited, where various courts have construed the duty of the guest in a vehicle, and have held his omission to perform such duty as necessarily precluding him or his representative from recovering. By the great weight of authority in such a situation, it is generally a question for the jury, and such is the theory of our own decisions. *Wilson v. Puget Sound Elec. R.*, 52 Wash. 522, 101 Pac. 50, 132 Am. St. 1044; *Field v. Spokane, Portland etc. R. Co.*, 64 Wash. 445, 117 Pac. 228; *Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39; *Allen v. Walla Walla Valley R. Co.*, 96 Wash. 397, 165 Pac. 99.

In the *Wilson* case, *supra*, a paid passenger was riding in an automobile for hire beside the driver, and we held that he was not guilty of contributory negligence in not warning, advising or directing the driver in a case of emergency, or not attempting to control the acts of the driver in passing other cars. It is also stated in that case:

“It would certainly be an extreme case where the court would be warranted in announcing, as a rule of law, that a passenger in an automobile was required to warn, advise, or direct its driver, or to apply to such passenger the doctrine of ‘stop, look and listen.’ We

are impressed . . . that ordinarily the only obligation on such passenger is to 'sit tight'."

We are impressed that the doctrine of "sitting tight" should not be applied except in the instance of sudden emergency, such as existed in the *Wilson* case, and cannot be extended to all situations.

In this case there was not a sudden emergency in the sense that it came, or should have come, so unexpectedly that the discovery of the danger and the accident itself were necessarily almost instantaneous and simultaneous.

Under the facts in this case, had the passenger looked northward up the track on his side of the car at any time after the car started up the incline toward the track at the speed of three miles per hour until within a very few feet of the track, he could not have avoided discovering the train and observing its rapid approach, and doubtless the slightest warning to the driver would have caused him to stop in good time; and, at the rate the truck was moving, the passenger could have left the truck without danger to himself. Appellants place great reliance upon our cases of *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224, and *Hoyle v. Northern Pac. R. Co.*, 105 Wash. 652, 178 Pac. 810.

The *Cable* case was one where the driver of an open buggy, having with him as a passenger his daughter seventeen years of age, was held to be guilty of contributory negligence in not stopping to look and listen before driving upon an interurban railway track; and the daughter was also held to be guilty of contributory negligence, in the absence of a showing that she endeavored to stop the horse, or to have her father do so, or any attempt on her part to take precaution, or that she was prevented from doing so.

The distinction between that case and this is only

Dec. 1921]

Opinion Per HOLCOMB, J.

in the fact that Ball, the driver, testifies that, when seventy or one hundred feet from the track, he looked northward and saw no train, and that he did not look any more. The *Hoyle* case, *supra*, where Hoyle, an employee of the driver of the automobile at the time of the accident, was held guilty of contributory negligence in failing to keep a lookout and observe the passenger train then due and rapidly approaching from his side upon a straight track, in full view. The only distinguishing facts between that case and this are that Hoyle had been employed upon the farm for about six months previously; the accident occurred upon a farm crossing, and he was familiar with the fact that the train which struck them was due at that time, and that it ran very rapidly along that part of the track. In the case at bar, while it is true the passenger was not familiar with the locality in which the accident occurred, the railroad tracks and the crossing-sign were in plain view, and there was an unobstructed view for one thousand feet or more to the north, extending the nearer they approached the track. It seems that the slightest observation and care would have discovered the danger in time to avoid the accident.

The court instructed the jury that one operating a locomotive and train has a right to assume, until the contrary becomes evident, that one approaching the track in an automobile will give the train the right of way, and is not required to attempt to bring his train to a standstill because the automobile may be seen to be approaching the track; but has a right to assume, until the contrary appears, that the occupants of such automobile will use reasonable care for their protection, and will give the train the right of way to which it is entitled under the law; and that those in charge are not required to limit or stop their locomotive and

train until it is apparent that those in the automobile about to cross the track are not aware of its approach, or do not intend to give it the right of way.

The jury were also instructed that the purpose of imposing upon railway companies the duty of giving signals prior to reaching highway crossings, and in limiting their speed within city limits, is to give warning to those about to use such crossing and to enable the train crew to have their engine and train in more sufficient control, but such duty so imposed upon railroad companies does not relieve one about to use such crossings, whether he be the driver of the machine, or situated, as was the deceased, Sadler, on the front seat with the driver, of the duty to use reasonable care for his own protection, or the positive duty imposed upon one in the position of the deceased, Sadler, to look and listen as he approaches the railroad track of which he has knowledge; and in this case, even if the jury should find that the speed at which this train was approaching was excessive, and that all of the signals which they find should have been given were not given, yet, if the deceased, Sadler, by exercising reasonable care in the way of looking and listening, or in the taking of such other precautions as a reasonably prudent man would take for his protection, could have otherwise seen or heard the approach of the train from the noise or sounds incident to its operation, if there was such noise or sound, then the fact that some signals were not given, or that the train was going at a rate of speed greater than that provided by the city ordinance, would not permit a recovery on behalf of the surviving widow; or, if the jury should find that the deceased, Sadler, failed to exercise that degree of care imposed upon him, she should not recover, irrespective of the negligence on the part of the defendants, or either of them.

These instructions stated the law correctly, and in

Dec. 1921]

Opinion Per HOLCOMB, J.

spite of these instructions the jury must have found that Sadler looked and listened as he approached the railroad track, and therefore exercised reasonable care, or took the same precautions as a reasonably prudent man would have taken for his protection; and this in face of the fact, as testified to by Ball, the driver, that Sadler said nothing to him, and in face of the facts that the train could have been seen for a distance of seventy feet back from the track one thousand feet away, and in plenty of time to warn the driver, or to have left the truck. In face of these undisputed facts, we feel obliged to say that the matter of Sadler's contributory negligence was conclusively established and left no fact upon that question for the jury to determine.

Every case depends largely upon its own facts for determination. The case before us falls within the rules announced in the cases of *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224; *Hoyle v. Northern Pac. R. Co.*, 105 Wash. 652, 178 Pac. 810. See, also, *Sherris v. Northern Pac. R. Co.*, 55 Mont. 189, 175 Pac. 269; *Robison v. Oregon-Washington Nav. Co.*, 90 Ore. 490, 176 Pac. 594; *White v. Portland Gas & Coke Co.*, 84 Ore. 643, 165 Pac. 1005; *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 29 L. R. A. (N. S.) 924, and case notes; *Rebillard v. Minneapolis, St. Paul & Sault Ste. Marie R. Co.*, 216 Fed. 503, L. R. A. 1915 B 953.

We are forced to the conclusion that the contributory negligence of the deceased was so conclusively established as to leave no question for the jury.

The judgment is therefore reversed and the action dismissed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16569. Department Two. December 29, 1921.]

EDGAR M. SWAN, *as Executor etc., Appellant*, v. D. C. DILLABOUGH, *as Administrator etc., Respondent*.¹

EXECUTORS AND ADMINISTRATORS (78, 79)—CLAIMS—TIME FOR PRESENTATION—STATUTES—CONSTRUCTION. LAWS 1917, p. 672, § 107, barring claims against a decedent's estate unless filed with the clerk of the court within six months after service on the personal representative, does not apply to estates in course of administration prior to the passage of the probate code of 1917.

Appeal from an order of the superior court for Clarke county, Simpson, J., entered April 26, 1921, allowing a claim against a decedent's estate. Affirmed.

Edgar M. Swan and *R. C. Sugg*, for appellant.

J. G. Arnold and *Henry Bauer*, for respondent.

HOLCOMB, J.—Appellant is the executor of the estate of James C. Cunningham, deceased, which is being administered in the superior court of Clarke county. Respondent is the administrator of the estate of Mildred E. Dillabough, deceased, being administered in the same court. Notice to creditors in the Cunningham estate was first published on January 12, 1911.

On November 4, 1911, respondent presented to appellant a claim against the Cunningham estate in the sum of \$1,800, which was allowed by appellant. The claim was not presented to the court for allowance until February 3, 1921. It was not filed with the clerk of the superior court until April 26, 1921. On February 3, 1921, the court made an order allowing the claim, and from that order the appellant has appealed.

Appellant contends that the superior court was in error in allowing the claim, for the reason that it was not filed with the clerk of the court within six months

¹Reported in 203 Pac. 19.

Dec. 1921]

Opinion Per HOLCOMB, J.

after the probate code of 1917 (Laws of 1917, p. 642) went into effect, and that the superior court had no jurisdiction to allow a claim of this kind until after it had been filed with the clerk of the court.

It is argued that claims against estates of deceased persons are not enforceable under the common law, and have no validity except as provided by statute; and that it may be enforced only in the manner expressly specified in the statute; citing *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395, and *First Security & Loan Co. v. Englehart*, 107 Wash. 86, 181 Pac. 13.

It is contended that, within six months after the probate code of 1917 went into effect, it was essential that this claim be filed with the clerk of the superior court, it not having been theretofore filed or presented to the court; and not having been filed within six months after the probate code of 1917 went into effect, it became barred; citing *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56; and *In re Thompson's Estate*, 110 Wash. 635, 188 Pac. 784.

The claim was presented in accordance with the provisions of the probate code in effect before 1917. Under the old law it was not necessary for the claim to be filed within any certain time. Under the probate code of 1917 (Laws of 1917, p. 672, § 107), it is necessary that the claim be served on the executor or administrator, or his attorney of record, and filed with the clerk of the court, together with proof of such service, within six months after the date of the first publication of notice to creditors, and if it is not so filed within the time prescribed, it is barred.

Section 107 of the probate code of 1917, provides:

“Every executor or administrator shall, immediately after his appointment, cause to be published in some

newspaper printed in the county, . . . a notice that he has been appointed and has qualified as such executor or administrator, and therewith a notice to the creditors of the deceased, requiring all persons having claims against the deceased to serve the same . . . ” etc.

There is nothing in the probate code of 1917 that in terms makes it retroactive, except it is retroactive in saving the benefits of all probate proceedings had before the taking effect of the act of 1917 and making them valid. Section 222, p. 707, Laws of 1917. And § 223, p. 707, of the Laws of 1917, provides that in all estates in probate at the time of the taking effect of the act, where notice to creditors had been given, or is being given, under the prior law, shall have the time such notices specified within which to present claims.

Assuredly it was never the intent of the legislature in framing the probate code of 1917 to make executors and administrators of estates then in process of probate begin all over again. That would be the effect of appellant's contention.

“Retroactive statutes are generally regarded with disfavor. Those not remedial will not be construed to operate retrospectively unless the intent that they shall do so is plainly expressed. Sutherland, Statutory Construction, § 463; Endlich on Interpretation of Statutes, § 281.” *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381.

Where estates were being administered upon prior to the passage of the probate code of 1917, the procedure to be followed was under the old law, except where otherwise provided in the new code, and certainly it was not otherwise provided in the new code as to notice, filing and presentation of claims.

The trial court was right, and its order is affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

Dec. 1921]

Opinion Per MAIN, J.

[No. 16702. Department Two. December 29, 1921.]

PONTUS ANDERSON *et al.*, Appellants, v. E. B. MCGILL
et al., Respondents.¹

APPEAL (418)—REVIEW—FINDINGS. Where a finding of the trial court on conflicting testimony is supported by a preponderance of the evidence, it will be sustained on appeal.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered March 12, 1921, upon findings in favor of the defendants, in an action in ejectment, tried to the court. Affirmed.

D. W. Locke, for appellants.

G. D. Eveland, for respondents.

MAIN, J.—The plaintiffs, claiming that the defendants in the erection of a building had encroached upon their land, brought this action to dispossess them. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law and judgment denying any relief, and the plaintiffs appeal.

The respondents are the owners of four lots in the city of Everett, upon which, about April 1, 1919, they commenced the erection of a three story brick garage, and completed the same in the fall of the same year. The appellants are the owners of two lots adjoining those of respondents upon which the garage was erected, and they claim that the north wall of the garage encroaches upon their lots from four to ten inches. The respondents claim that there is no encroachment and that the wall, including footing, is located exclusively upon their own property.

The question in the case is solely one of fact, and is, whether the respondents, in erecting the wall referred

¹Reported in 202 Pac. 969.

to, encroached upon the property of the appellants. The evidence upon the question was conflicting. The witnesses for the appellant, including a civil engineer, testified that there was encroachment. The witnesses for the respondent, including a civil engineer, testified that there was no encroachment. The trial judge, after the conclusion of the testimony and before disposing of the case, in company with the attorneys for the respective parties, viewed the premises in order to better enable him to weigh and give effect to the testimony, and subsequently made the following finding:

“That some time prior to the commencement of this action, said defendants erected upon the lots owned by them, as hereinbefore stated, a three story brick garage with a concrete foundation, the concrete foundation running along the boundary line between the respective lots of said plaintiffs and said defendants, extending beneath the surface of the ground at least 12 feet in the rear, and at least 6 feet in the front, and said building covering practically the entire lots. That said building so erected by said defendants and the foundation thereof are located exclusively on the lots so owned by said defendants, and no part of the same are located upon the lots so owned by said plaintiffs, and that said defendants do not occupy any part of said plaintiffs' property. That it appears that, in the constructing the foundation so running along said boundary line, some of the thin mixture of concrete escaped under the form at the base of said foundation, and for a few feet toward the front end thereof, ran over the boundary line a few inches on the lots so owned by said plaintiffs, but that the same is no part of the foundation and constitutes no part of the permanent structure of said building or foundation, and can easily be removed with a pick in the event that said plaintiffs should need to remove the same in the subsequent use of the lots so owned by them.”

After giving attentive consideration to all the evidence in the case, we are of the opinion that the trial

Dec. 1921]

Syllabus.

court's findings are sustained by the preponderance of the evidence. A further discussion of the question would serve no useful purpose because, as above indicated, it is solely one of fact.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16442. Department Two. December 30, 1921.]

J. B. LINCOLN *et al.*, Respondents, v. KUSKOKWIM
FISHING & TRANSPORTATION COMPANY, Appellant.¹

CONTINUANCE (13)—GROUNDS—ABSENCE OF WITNESS. A motion for a continuance on the ground of an absent witness is insufficient under Rem. Code, § 322, unless presented by affidavit.

CORPORATIONS (172)—REPRESENTATION BY OFFICERS—DISPOSAL OF ASSETS. The fact that a corporation has ceased to operate its business would not, in the event there had been no dissolution, deprive it of the right to make an assignment of accounts due it.

EVIDENCE (105)—HEARSAY. In an action to recover for an overpayment of freight charges, testimony by plaintiff of statements made to him by his bookkeeper is inadmissible as hearsay.

EVIDENCE (128)—DOCUMENTARY EVIDENCE—MEMORANDA. Ledger entries are not admissible to prove an account stated, such book not being one of original entry, where there was no evidence showing the method of keeping the ledger when the entries were made nor by whom made.

PAYMENT—MISTAKE—RECOVERY OF PAYMENT—CONSIDERATION. Where a carrier by water collected freight on a shipment of furniture on the customary basis of space rates, instead of at the rate for general merchandise which the shipper claims he contracted for, the alleged overcharge cannot be recovered on the theory of money paid by mistake, since the money was paid upon a consideration and the charge was reasonable for the service rendered; and if it be considered a mistake in the terms of the contract, it was a mistake of law for which there could be no recovery.

¹Reported in 203 Pac. 62.

Appeal from a judgment of the superior court for King county, Ralston, J., entered July 15, 1920, in favor of the plaintiffs, in an action on assigned accounts, tried to the court. Affirmed in part and reversed in part.

Trefethen & Findley, for appellant.

Edward H. Chavelle, for respondents.

HOVEY, J.—This is an action by J. B. Lincoln and the Standard Oil Company, claiming under assignment from Karl Theile & Company, against the appellant and one of its stockholders upon four causes of action. The Standard Oil Company has an interest in the assignment to the extent of a claim of \$1,500 owned by it, and the respondent hereinafter referred to is the plaintiff J. B. Lincoln.

Karl Theile & Company was a trading corporation operating in Alaska and shipping goods from Seattle, and the appellant is the owner of several steamers engaged in transporting freight to the ports in which Theile & Company operated. Louis Knafllich was the president and manager and also a stockholder in the appellant and was in actual charge of one of its vessels, and was the person who conducted practically all of the business on behalf of the appellant out of which this controversy arises. The case was commenced in March, 1920, and was called for trial in July of the same year.

At the time the case was called for trial, the attorney for the appellant asked for a continuance, stating that the presence of Louis Knafllich was absolutely necessary to present the case of the appellant, and that he was in Alaska at the time the case was commenced, and had been ever since. Respondent objected to the showing made and the court proceeded with the trial.

Dec. 1921]

Opinion Per HOVER, J.

Under § 322, Rem. Code (P. C. § 8485), the showing made was not sufficient, as it was not presented by affidavit.

Appellant contends that the case of the respondent should fail because there is testimony to the effect that Karl Theile & Company, a corporation, was disbanded at the time the assignment was made and that there was no authority in any one to assign these claims. The testimony shows that J. B. Lincoln owned all the shares in this company but one and was the proper officer to execute the assignments, and in fact did make them as an officer to himself individually. We think the testimony only went to the effect that the corporation had ceased to operate its business, but that would not deprive it of its right to handle such property as it still retained. There is no evidence of any formal dissolution, nor that its corporate activities had been dormant a sufficient length of time to establish a dissolution.

The first cause of action is based upon what is claimed to be an overcharge or balance due for sums overpaid for freight charges. Respondent attempted to establish this item by statements made by his bookkeeper to him, which statements were clearly hearsay. He also produced a memorandum which he claimed to be an account stated, purporting to be signed by the appellant per Lochow, dated May 29, 1919, and showing a balance of \$1,325.19. This cause of action was for \$1,000 only, but it was contended that this memorandum covered both the first and second causes of action, the latter being for \$325. The evidence showed that Lochow has been for many years an employee of Schwabacher Hardware Company, which company for some three months before the trial had possession of the books of the appellant on an assignment of the

same to Sol Friedenthal, another one of its employees. At the time of this assignment, the Schwabacher Company was a large creditor of the appellant, and the assignment had been made to enable the trustee to protect the interests of the creditors of the appellant. It so happened that Lochow had been in the employ of the appellant for three months in the year 1917, but he never had anything to do with the books of the appellant and had no personal knowledge of any of the entries, nor any authority to bind the appellant. There was also introduced a page from the ledger of appellant showing a credit balance of some \$1,300 in the year 1918. The entries started out with a forwarding charge of \$5,382, and some other items of charge which do not show what they are for, and some credit items aggregating over \$6,000, with no explanation of their subject-matter. The balance there shown is some \$960, and the space above this item is ruled off. Following this are the figures \$353, under date of December 31, 1918, with a penciled total of \$1,321. There was no testimony whatever to explain these items, nor in support of the contention that any credit balance still existed, except the hearsay evidence before referred to. This was evidently not a book of original entry. No testimony was introduced showing the method of keeping the ledger when the entries were made, or by whom made.

On the second cause of action, no evidence whatever was offered except the entry of the figures at the foot of the preceding entry, and the plaintiff testified he did not know of his own knowledge what it was for. We believe there was not competent evidence to sustain either the first or second cause of action.

For his third cause of action the respondent claimed a balance due in favor of one Clement Sara, and intro-

Dec. 1921]

Opinion Per HOVEY, J.

duced a receipt signed by Knafllich for a draft for \$1,000, account Clement Sara, and an entry from the books of the appellant showing credit for this \$1,000, with charges aggregating \$418.46. Hearsay evidence was tendered on behalf of this item. Excluding this hearsay evidence, we consider there was sufficient evidence to sustain this cause of action.

For his fourth cause of action respondent claims an overcharge for freight on a shipment of furniture. The freight was shipped under a written contract which provided a charge of \$22.50 per ton weight on general merchandise, and a different charge for certain other items which are not material here. Appellant contended that furniture was not to be included within the term general merchandise; that, owing to its bulky nature, it was customarily charged for at space rates wherein forty cubic feet of space are charged for as a ton, and it clearly appears that the charge was made on this basis and collected for at the point of delivery. This freight was delivered for shipment at the dock in May, 1917, and was carried by steamer during the fall of 1917 and delivered and paid for. Respondent does not make clear upon what he predicates his right of recovery upon this cause of action, but we assume that it is upon the theory of money paid under mistake, but we believe that this case does not come within the rules of law applicable to this form of recovery. One essential for the recovery of money paid under mistake is that the payment is made without consideration. It is not disputed that the sum collected was reasonable for the service rendered, and it cannot be said that the money was paid without consideration. 30 Cyc. 1316. If it be considered as a mistake in the terms of the contract, this is one of law and not of fact, for which there is no recovery. 30 Cyc. 1319. *Jackson v. Ferguson*, 2 La.

Ann. 723. Recovery should not have been allowed upon this cause of action.

The judgment will be modified by eliminating the items of the first, second and fourth causes of action, and will be affirmed for the sum of \$581.14, the amount of the third cause of action.

Appellant will recover costs.

PARKER, C. J., HOLCOMB, MAIN, and MACKINTOSH, JJ., concur.

[No. 16645. Department Two. December 30, 1921.]

CHARLES RAZZANO *et al.*, Respondents, v. W. T.

BURCHAM *et al.*, Appellants.¹

PUBLIC LANDS (72)—EXEMPTIONS—LIABILITY FOR DEBTS—RENEWAL NOTES. Under U. S. Rev. Stat. § 2296, exempting public lands from liability to the satisfaction of any debt contracted prior to patent, a renewal note given after patent to replace notes given by the entryman prior to patent, cannot be enforced against the land, as against either the entryman or his grantee.

JUDGMENT (163)—COLLATERAL ATTACK—PUBLIC LANDS—EXEMPTIONS—LIABILITY FOR DEBTS. An action by the grantee of an entryman of public land to quiet title as against an execution sale and sheriff's deed to the property, founded on a debt of the entryman prior to patent, is not a collateral attack on the judgment, since the liability of the land to the satisfaction of the judgment was not a question in the action in which the judgment was rendered.

Appeal from a judgment of the superior court for Kittitas county, Truax, J., entered March 4, 1921, in favor of the plaintiffs, in an action to quiet title, tried to the court. Affirmed.

Pruyn & Hoeffler, for appellants.

Eugene E. Wager, for respondents.

¹Reported in 203 Pac. 23.

Dec. 1921]

Opinion Per HOVEY, J.

HOVEY, J.—In the year 1905, Salvino Razzano, the father of the respondents, made a homestead entry of certain land in Kittitas county, and obtained his patent in November, 1911. In October, 1915, the holder of the patent and his wife conveyed to the respondents. Prior to the issuance of the patent, Salvino Razzano was indebted to the appellant W. T. Burcham, the indebtedness being represented by certain notes. On December 4, 1911, Severina Razzano, the wife of Salvino Razzano, gave a new note which was a renewal of the old notes and the old notes were surrendered. The testimony of the appellant is to the effect that there was an understanding that this new note was to be also signed by Salvino. Suit was brought upon this new note in September, 1915. The wife alone was made party under the first complaint, but thereafter an amended complaint was filed and the husband was joined. Judgment was obtained upon this note against both Salvino and Severina Razzano on November 28, 1916. Execution was issued and the property described in the patent was levied upon and sold to the appellant W. T. Burcham. The sale was thereafter confirmed and sheriff's deed issued.

The present action was brought by the respondents to quiet title to the land. Appellants set up in their answer that the conveyance from the parents to the sons was fraudulent and without consideration. The trial court entered a decree quieting the title to the property in the respondents and adjudging the sheriff's sale to the appellant W. T. Burcham to be null and void.

From the evidence presented, the trial court was justified in finding that the deed under which the respondents claimed title was for a consideration and not made with intention to defraud creditors. But we think that the judgment should also be sustained upon

the ground that the land was not subject to the lien of the judgment under which appellants claim.

Appellants contend that the renewal note is a new obligation and, being dated after the issuance of patent, that the origin of the debt for which it was given cannot be inquired into; and further, that the present action is a collateral attack upon the judgment rendered in the action upon the note. We cannot agree with either contention. U. S. Rev. Stat. 2296, reads as follows:

“No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.”

This has been the subject of a great many decisions and we will refer to a few of them. Its constitutionality has been upheld in *Ruddy v. Rossi*, 248 U. S. 104, and in that case it was held that the exemption applies to debts incurred between the issuance of the receiver's final receipt and the patent, as well as to prior debts. The exemption extends to the grantee of the entryman. *Dickerson v. Cuthburth*, 56 Mo. App. 647; *Baldwin v. Boyd*, 18 Neb. 444, 25 N. W. 580. The supreme court of Oregon in *Wallowa National Bank v. Riley*, 29 Ore. 289, 45 Pac. 766, 54 Am. St. 794, held that renewals of older notes were but the evidence of the same debt and could not be made liens upon lands patented after the original debt was contracted. This case was followed by *Schultz v. Levy*, 33 Ore. 373, 54 Pac. 184. To the same effect is *Ash v. Eriksson*, 115 Minn. 478, 132 N. W. 997. We find no authority to the contrary. The object of the statute is to secure to the entryman exemption from all contract liabilities prior to patent.

On the question of collateral attack, appellants cite *Watkins Land-Mortgage Co. v. Mullen*, 62 Kan. 1, 61 Pac. 385, 84 Am. St. 372. In that case land of a deceased entryman was sold in a probate proceeding for

Dec. 1921]

Opinion Per HOVEY, J.

the payment of his debts, and in a suit by the heir, who sought to invoke the protection of the exemption statute, the court held that, inasmuch as the probate court had passed upon the question of the liability of the land for the payment of the debts, and had there found that "the requirements of law and the orders of the court had been complied with," this was a finding in opposition to the claim that the land was not liable for the debts, and that the subsequent suit by the heir was in effect a collateral attack. In the present case, no attack was made upon the judgment obtained by the appellant. That judgment merely found a certain sum to be due from the signers of the note to the appellant. The question of the liability of the land to the satisfaction of the judgment has never been a matter of judicial determination until the bringing of the present suit. In practically all the cases where the question has been raised there has either been a suit by the claimants under the holders of the patent to set aside the lien of the judgment, or a suit by the holders of the judgment to subject the land to its payment. In the case of *Schultz v. Levy, supra*, the property had been seized under attachment pending the suit, and the lien of the attachment was continued in effect by the judgment and the property ordered sold thereunder, but it was there held that the subsequent action to free the land from the lien was not a collateral attack.

We find no authority supporting the position of appellants, and in principle they should not prevail.

The judgment appealed from is affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOLCOMB, JJ.,
concur.

[No. 16733. Department One. December 30, 1921.]

JANE H. JOHNSON *et al.*, Respondents, v.
BURNS LYMAN SMITH, Appellant.¹

APPEAL (464)—HARMLESS ERROR—INSTRUCTIONS — REFUSAL OF REQUEST. The refusal of the court to give a requested instruction, although it may be correct as an abstract principle of law, is not prejudicial, where the subject-matter is included in general instructions, covering the different features of the law applicable to all the facts.

SAME (460)—HARMLESS ERROR—INSTRUCTIONS. An isolated portion of an instruction in a negligence action telling the jury that plaintiff is required to use that degree of care and prudence which a "person of ordinary intelligence" would use, though technically incorrect, is not prejudicial, where in another part of the same instruction the jury are expressly charged that the question for their consideration is, "Did plaintiff exercise reasonable care and prudence for her own safety under the facts and circumstances in the case?"

TRIAL (105)—INSTRUCTIONS—REFUSAL OF REQUESTS. In an action for personal injuries received by plaintiff from opening the wrong door and falling down a flight of steps, the refusal of a requested instruction that "it was the plain duty of plaintiff to use her sense of sight and look where she was stepping" was not error, where the jury were charged as to the duty of plaintiff to exercise reasonable care and prudence for her safety, and to determine whether the proximate cause of the accident was due to her failure to exercise such care and prudence.

NEW TRIAL (49-1)—MISCONDUCT OF JURY. The affidavit of a third person, based upon the unsworn statement of a juror to him after the trial, respecting misconduct of a juror in the jury room, is not sufficient to support a motion for a new trial.

SAME (39)—NEWLY DISCOVERED EVIDENCE—CREDIBILITY OF WITNESS. An affidavit of newly discovered evidence supporting a motion for new trial on that ground is insufficient where it discloses matter going only to the credibility of plaintiff as a witness, rather than to her right of recovery.

APPEAL (126)—PRESERVATION OF GROUNDS—OBJECTIONS—CONDUCT OF COUNSEL. Misconduct of counsel for the prevailing party cannot be urged as ground for new trial where no objection or exception was taken at the time.

¹Reported in 203 Pac. 56.

Dec. 1921]

Opinion Per MITCHELL, J.

Appeal from a judgment of the superior court for King county, Reynolds, J., entered April 26, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through falling down a stairway. Affirmed.

Earl G. Rice and Chadwick, McMicken, Ramsey & Rupp, for appellant.

Vince H. Faben, for respondents.

MITCHELL, J.—In this case, a personal injury action, the trial court entered a judgment for the defendant notwithstanding the verdict, from which the plaintiff appealed. The judgment was reversed on that appeal, with directions to the trial court to consider and act upon defendant's motion for a new trial. The former opinion is reported in 114 Wash. 311, 194 Pac. 997, wherein the facts in the case are stated with considerable detail. The motion for a new trial was denied by the trial court, and from a judgment upon the verdict, the defendant has appealed.

The first assignment of error is the refusal of the following requested instruction:

“If you find that the plaintiff fell down the stairway mentioned in the complaint in such manner as to constitute an accident or circumstance not to be reasonably anticipated as a natural or necessary incident to the use by the public of the sidewalk in front of said building or the entrance to said building—in other words, if you find that the plaintiff's fall was an unusual and extraordinary occurrence such as could scarcely be expected to happen other than through the fault or negligence of the person so falling, or of some third person or agency—I charge you that your verdict must be for the defendant because the owner of premises adjacent to a street is not required to anticipate or guard against such unusual and extraordinary occurrences.”

It is argued that, as the theory of the respondents was that there was faulty construction of the building, while appellant's theory was to the contrary, the court should have given the requested instruction in support of appellant's theory. Among other things, the jury was instructed:

"You are instructed that defendant has a right to maintain a door and stairway to the basement of his building, provided he maintains same in a reasonably safe condition, so that any person, stranger thereto, who might open same while exercising due and proper caution for his or her own safety, would not fall down said stairway and be injured thereby.

"And you are instructed that it would not be negligence *per se* for the defendant to leave the door in question unlocked, nor was he bound to anticipate that persons entering his building would assume every door opening into the building was intended for general use of the public, or that any person would open the door in question and precipitately enter the same, without the use of his or her senses and without thought as to where it led.

"You are instructed that negligence is never presumed, but must be proved by a preponderance of the evidence by the person who charges such negligence. You are therefore instructed that the fact that plaintiff fell down the stairway in question and that she was injured, if at all, is not any proof at all that the defendant was negligent in maintaining the door and stairway in question."

In instructing the jury the court did not adopt the plan of stating hypothetically alleged facts constituting the theory of either party, but followed the plan of general instructions covering the different features of the law applicable to all the facts. Assuming the instruction requested was correct as an abstract principle of law, we are satisfied, considering the instructions given already mentioned, and others bearing upon the subject, the refusal to give the one requested was not

Dec. 1921]

Opinion Per MITCHELL, J.

prejudicial. *Edwards v. Seattle, Renton & Southern R. Co.*, 62 Wash. 77, 113 Pac. 563.

It is also claimed the court committed error in the use of certain language in one of the instructions, as follows:

“You are instructed that the law required the owner of a public building like the one in question, to maintain it and the approaches thereto, in such reasonably safe condition that a reasonably careful and prudent person in entering, or desiring to enter the same, while exercising ordinary care for his or her own safety will not be injured. But you are instructed that a person entering, or endeavoring to enter such a building as the one in question, is required to use that degree of care and prudence which a person of ordinary intelligence would, or should exercise, under similar circumstances, who is mindful of his or her own safety.”

The words “of ordinary intelligence,” attributed to one required to exercise care and prudence, are the words objected to, and it is contended, correctly we think, that the law does not fix a degree of intelligence as a standard in negligence cases, for the reason that a person of high intelligence may be presently or habitually careless, while a person of less than ordinary intelligence may be over careful. The proper standard is one of ordinary care and prudence, rather than ordinary intelligence, but it does not necessarily follow that the use of the words complained of constitutes prejudicial error. Immediately following, and as a part of the same instruction, the court said:

“You will therefore observe that there are two questions for your consideration:

“1. Did defendant provide reasonably safe and suitable means of entrance to his building at the time alleged; and—

“2. Did plaintiff exercise reasonable care and prudence for her own safety under the facts and circumstances in the case, and was the proximate cause of the

accident due to want of reasonable care of the defendant, or was it due to the lack of reasonable care and prudence of the plaintiff herself.”

The objectionable words, without modification and unexplained, would present a different situation than when considered in their immediate setting and in connection with other portions of the instruction. We think the words were not capable of misleading the jury. In the case of *Cheichi v. Northern Pac. R. Co.*, 66 Wash. 36, 118 Pac. 916, upon this subject, we said:

“It is the settled rule of this court that, although detached statements or expressions of the court in its charge to the jury may be technically erroneous, yet if the instructions as a whole fairly state the law, there is no prejudicial error. It was said by this court in the syllabus to *Seattle Gas & Elec. L. & M. Co. v. Seattle*, 6 Wash. 101, 32 Pac. 1058:

“ ‘Although detached expressions in the court’s charge to a jury, if considered as independent expressions, may be technically erroneous, yet if the instructions as a whole, and considered together, fairly state the law, in nowise misleading the jury, there is no prejudicial error.’

“And in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111:

“ ‘The whole instruction must be construed together. So construed, it was not error. It is true that this sentence is not technically correct; . . . This court has frequently held that where an isolated portion of an instruction, standing alone, may be technically erroneous, yet if the whole instruction, taken together, fairly states the law, it will be upheld.’ ”

See, also, *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481; *Edwards v. Seattle, R. & S. R. Co.*, 62 Wash. 77, 113 Pac. 563; *Murphy v. Chicago, Milwaukee & St. P. R. Co.*, 66 Wash. 663, 120 Pac. 525.

Next, it is contended the court should have instructed

Dec. 1921]

Opinion Per MITCHELL, J.

“it was the plain duty of plaintiff to use her sense of sight and look where she was stepping.” As already seen, the court submitted to the jury’s consideration the question of whether the plaintiff exercised reasonable care and prudence for her safety, under the facts and circumstances, and whether the proximate cause of the accident was due to the lack of reasonable care and prudence of the plaintiff. This we think was sufficient.

The motion for a new trial was denied notwithstanding two affidavits on behalf of the appellant. One of them was by one of the attorneys for the appellant to the effect that several of the jurors stated to him that another juror told the jury, while they were in consultation, that he had attempted to open the door to the basement of the Smith building, in which plaintiff was injured, mistaking it for the true entrance, and that such statement was considered by the jury in deliberating upon their verdict. Such an unsworn statement of a juror to an outsider is, upon grounds of public policy, not competent evidence to show misconduct of the jury. In *Maryland Casualty Co. v. Seattle Elec. Co.*, 75 Wash. 430, 134 Pac. 1097, we said:

“Whatever the breadth of the application of the rule as to the inadmissibility of the affidavits of jurors to establish their misconduct, it is almost universally held that affidavits of third persons as to unsworn statements of jurors tending to show either the fact of misconduct or its effect upon the verdict cannot be received for any purpose because they are of a purely hearsay character.

“ ‘Numerous affidavits setting forth these transactions were presented to the court. An examination of them shows that all the statements therein contained are pure hearsay, consisting of conversations had by the affiants with some of the jurors, or declarations made by jurors in their presence. There is no pretense

that the prevailing party in the action knew of or had anything whatever to do with the alleged misconduct of the jurors, or that the jurors, or either of them, were approached or improperly influenced by any person. There are no facts in regard to this assignment that would authorize this court to interfere with the order of the court below denying a new trial. Statements made by jurors not under oath, after the trial is over, are not competent evidence. *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 209, 221.'

"See, also, *Green v. Terminal R. Ass'n of St. Louis*, 211 Mo. 18, 109 S. W. 715; *Stevenson v. Detroit & M. R. Co.*, 118 Mich. 651, 77 N. W. 247; *Shepherd v. Inhabitants of Camden*, 82 Me. 535, 20 Atl. 91; *Gans v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 915; *Kimic v. San Jose-Los Gatos Interurban R. Co.*, 156 Cal. 379, 104 Pac. 986; *Gregory v. Bijou Theater Co.*, 138 App. Div. 590, 122 N. Y. Supp. 1085; *Heldmaier v. Rehor*, 188 Ill. 458, 59 N. E. 9; *Cain Bros. Co. v. Wallace*, 46 Kan. 138, 26 Pac. 445; *Peterson v. Skjelver*, 43 Neb. 663, 62 N. W. 43."

The other affidavit supporting the motion for a new trial was upon the ground of newly discovered evidence. Respondent testified at the trial that, at the time she was injured, she was getting \$125 per month and expenses. The person by whom she had been employed did not testify at the trial. After the verdict, the former employer made affidavit that, during an illness, the respondent took a friendly interest in her, and although affiant paid certain small bills for her and her expenses, that she never agreed to pay her any fixed amount of salary, nor that she should remain with her any fixed period of time. The conflict is not very definite in detail. The purpose of the newly discovered evidence was to impeach or discredit respondent's evidence to the extent it differed from it. It goes to the credibility of the respondent as a witness rather than the right of recovery and does not warrant the granting

Jan. 1922]

Syllabus.

of a new trial. *Harvey v. Ivory*, 35 Wash. 397, 77 Pac. 725; *Hoffman v. Hansen*, ante p. 73, 203 Pac. 53.

The claim of misconduct on the part of counsel for the respondent before the jury is of no avail. That which is now objected to was not considered of sufficient importance at the time it happened to elicit any objection or exception. Nor do we think the verdict excessive.

An examination of the record in this appeal and the one in the former appeal, both of which have been considered in the present case, convinces us there was sufficient evidence, the jury believing it, to justify the verdict and judgment. Finding no error, the judgment appealed from is affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16666. Department Two. January 3, 1922.]

*In the Matter of the Estate of JAMES W. STOOPS AND
KATHERINE STOOPS.*¹

EXECUTORS AND ADMINISTRATORS (88)—COURTS (51)—PROBATE JURISDICTION—CLAIMS—TITLE TO PROPERTY. Where, in the matter of the distribution of a decedent's estate, the jurisdiction of the superior court, sitting in probate, had been invoked to determine the question of the good faith of a deed from one beneficiary to his wife, under the consent of the parties, all of whom were before the court and the issues had been made up between them, the one invoking the action of the court cannot object that it was without jurisdiction to determine the issue.

APPEAL (388)—RIGHT TO ALLEGE ERROR. On appeal from an order of distribution of an estate, the question of sale of property of the estate for more than the amount of the judgment will not be examined, when there was no appeal from such action and the period of redemption has passed.

¹Reported in 203 Pac. 22.

Appeal from a judgment of the superior court for Clarke county, Simpson, J., entered March 11, 1921, upon findings in favor of the defendants, upon the hearing of objections to the final account of an administrator. Affirmed.

Chas. H. Glos and J. N. Percy, for appellant.

Miller, Wilkinson & Miller, for respondent Clarke County Bank.

George S. Shepherd, for respondent Ellen A. Stoops.

MACKINTOSH, J.—It is not necessary for a determination of this case to recite a rather complicated condition of affairs which involve the title to shares of the estate of the deceased parents of Louis and John Stoops. As a result of different transactions between the two brothers and conveyances from them to one another, and from them to their wives, the trial court found in favor of Ellen A. Stoops, the wife of John. These matters all presented disputed questions of fact, and our review of the testimony does not show us that it preponderates against the findings of the trial court, and we are satisfied to adopt them as narrating the true state of affairs.

The questions of law presented are, first, that the superior court, sitting in probate, had no jurisdiction to hear and determine the question of the good faith of the deed from Louis Stoops to his wife. This contention is based upon the decision in *In re Decker's Estate*, 105 Wash. 221, 177 Pac. 718. This matter came up on the hearing on the order of distribution, and it seems to us that the appellant cannot, even though § 163, p. 689, and § 220, p. 706, Laws of 1917, permit it in some cases, raise the objection when the whole matter was brought up by her petition. All the parties were before the court, the issues had been made up

Jan. 1922]

Opinion Per MACKINTOSH, J.

between them, and the jurisdiction of the court had been voluntarily invoked. As a matter of fact, consent had been given to the court to try out and determine the issues. In the case of *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42, this court, in effect, recognizes this rule.

It is next urged that Ellen A. Stoops was not a *bona fide* purchaser. This involves merely a question of fact, as it related to the delivery of the deed given by John Stoops, and we cannot disagree with the trial court's findings that there was no delivery thereof.

The appeal, in so far as it affects the rights of the Clarke county bank, in addition to questions heretofore considered, involves the question of the sale on execution for more than the amount of the judgment. This was a matter from which no appeal was taken, and the period of redemption having passed, the court will not examine into it.

Upon the whole record, we are satisfied the decision of the lower court is correct, and it is therefore affirmed.

PARKER, C. J., HOVEY, MAIN, and HOLCOMB, JJ., concur.

[No. 16578. Department One. January 3, 1922.]

GEORGE HAMES *et al.*, *Appellants*, v. SPOKANE-BENTON
COUNTY NATURAL GAS COMPANY *et al.*, *Respondents*.¹

ACTION (24)—JOINDER OF CAUSES—PARTIES AND INTERESTS INVOLVED. A complaint is demurrable for misjoinder of causes of action, under Rem. Code, § 296, where it joins a stockholders' action brought on behalf of, and common to, all stockholders, with another cause of action not common to all stockholders, but existing only in favor of the plaintiffs for the recovery of money loaned to the corporation and the foreclosure of the security given therefor.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered December 8, 1920, upon sustaining a demurrer to the complaint, dismissing an action by stockholders against a corporation. Affirmed.

Mulligan & Bardsley, for appellants.

TOLMAN, J.—Appellants, plaintiffs below, after a demurrer had been sustained to their complaint, refused to plead further and elected to stand upon their complaint, whereupon a judgment of dismissal was entered against them, from which they have appealed.

The complaint purports to set up two causes of action. The first cause of action is set forth in five paragraphs, alleging, respectively, the corporate existence of the defendant corporation; that the individual defendants are officers and trustees and in full control of the affairs of the defendant corporation; that plaintiffs are stockholders in the defendant corporation and bring this action in their own behalf as such stockholders and on behalf of all other stockholders who may join in the action. The fourth paragraph sets out the objects and purposes for which the defendant corpora-

¹Reported in 203 Pac. 18.

Jan. 1922]

Opinion Per TOLMAN, J.

tion was organized, and alleges that, since its incorporation, it has been engaged in carrying on the business for which it was incorporated, and has acquired property and property rights. The fifth paragraph, disregarding conclusions and liberally construing it with reference to such facts as are meagerly stated, pleads that the individual defendants, while acting as officers and trustees of the corporation, caused the corporation to enter into contracts with themselves for the payment to them of unreasonable expenses, salaries and commissions on the sale of stock, which they have caused to be paid to themselves from the funds of the corporation.

The second cause of action consists of three paragraphs. By the first the plaintiffs adopt the allegations in the first four paragraphs of the first cause of action, and the remaining two, in substance, plead that the individual defendants, through misrepresentations, procured plaintiffs to loan to the corporation \$3,450, and take its treasury stock as collateral security therefor, and then caused the transaction to be entered and shown on the books of the corporation as a sale of treasury stock, and paid to themselves a commission on such sale of \$1,380, placing in the treasury of the corporation only the remainder of the sum loaned. Interwoven therewith are allegations of a wrongful disposition of the property purchased with the borrowed money, which have no relation to plaintiffs' individual cause of action for the money loaned, and which could give rise only to a cause of action by the corporation or its stockholders.

A judgment is demanded against all of the defendants for the amount loaned, with interest; for the foreclosure of the collateral security, and also for the appointment of a receiver for the corporation, and for other and general relief.

To this complaint the defendants separately and severally demurred. As to the first cause of action, upon the ground that plaintiffs have no legal capacity to sue, and that the complaint does not state facts sufficient to constitute a cause of action. To the second cause of action, the demurrer is based upon the same grounds, and, in addition, that several causes of action have been improperly united; and to the whole complaint upon the ground that several causes of action have been improperly united.

The first cause of action, considered in the light of *Wonderful Group Min. Co. v. Rand*, 111 Wash. 557, 191 Pac. 631, and *Sacajawea Lumber etc. Co. v. Skookum Lumber Co.*, 116 Wash. 75, 198 Pac. 1112, which lay down the salutary rule that a trustee of a corporation has no power to vote upon a question in which his individual interest is opposed to that of the corporation, perhaps states a cause of action, and, if so, a cause of action which is common to all stockholders of the corporation, and one for which, under Rem. Code, § 190 (P. C. § 8271), one stockholder may sue for the benefit of all. We hold that, by the first cause of action, plaintiffs plead only a cause of action common to all stockholders of the defendant corporation. The second cause of action, applying the same rule of liberal construction, states a cause of action not common to all of the stockholders of the defendant corporation, but existing only in favor of the plaintiffs for the recovery of money loaned, with interest, and the foreclosure of the security given therefor. If it attempts to do more, the further attempt is abortive because not separately stated. It is somewhat doubtful whether this cause of action, as pleaded, is against the corporation or the individual defendants, but, as the prayer is for judgment against "the defendants", we assume that the pleader

Jan. 1922]

Opinion Per TOLMAN, J.

intended to charge all of the defendants with liability for the sum alleged to have been loaned. It is at once apparent that the second cause of action has nothing to do with the first, and that the stockholders of the corporation, as such, have no interest whatsoever therein. We find no provision in the statute, Rem. Code § 296 (P. C. § 8380), with reference to the joinder of causes of action which permits the joinder in the same suit of the two causes of action pleaded. In the section referred to, after specifying what causes of action may be joined, the statute provides, "but the causes of action so united must affect all of the parties to the action, and not require different places of trial, and must be separately stated."

It is too plain for argument that the causes of action sought to be united here do not comply with this rule; the first cause of action being purely a stockholder's action brought on behalf of, and common to, all stockholders, cannot be united with the second cause of action, which is personal to the plaintiffs only. Moreover, the first cause of action seems to fall under subdivision 7 of the section referred to, permitting the uniting of claims against a trustee by virtue of a contract, or by operation of law, while the second cause of action falls under subdivision 1 of the statute permitting the uniting of causes of action growing out of contract, express or implied.

We are forced to the conclusion that the demurrers were properly sustained, and, therefore, the judgment must be, and is, affirmed.

PARKER, C. J., MITCHELL, FULLERTON, and BRIDGES, JJ., concur.

[No. 16751. Department Two. January 4, 1922.]

A. L. DUNAGAN, *Respondent*, v. SCHOOL DISTRICT No. 4
OF SNOHOMISH COUNTY, *Appellant*.¹

APPEAL (418)—REVIEW—FINDINGS. The finding of the trial court based upon conflicting evidence will not be disturbed on appeal, when the evidence does not clearly preponderate against it, in view of the opportunity of the trial court to view the witnesses and their demeanor, and to judge of their credibility.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered April 11, 1921, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Thos. A. Stiger, for appellant.

Cooley, Horan & Mulvihill, for respondent.

HOLCOMB, J.—This case presents nothing but a question of facts.

Respondent brought suit upon an oral contract alleged to have been entered into with the school district for the transportation of children of the school district from the Highland District to the Central School at Lake Stevens, at the stipulated sum of \$1,000.

Appellant is a consolidated school district with its principal or central school at Lake Stevens, and with outlying schools at, among other places, Lochsloy, sometimes called Outlook, and at Highland, to the north. The north route is known as the Highland route, and the contention of the school district is that it has application to the route-carrying children of the north end, and that the north route covers the transportation of the Lochsloy district children to Highland, and at Highland the high school children to the central school at Lake Stevens.

¹Reported in 203 Pac. 15.

Jan. 1922]

Opinion Per HOLCOMB, J.

Respondent, who is employed as a teacher of manual training in the central school at Lake Stevens, entered into a contract with the school district to teach manual training at \$145 per month. He claims that the oral contract entered into with appellant was for transporting the Highland children, and did not include the transportation of the Lochsloy children to Highland. The Lochsloy school is some two and one-half miles north of the Highland school.

Appellant claims that, at best, there was a difference in the minds of the directors of appellant and of respondent as to what was the intention of the parties to the contract, and that there was no meeting of the minds, therefore no contract.

The trial court found that the oral contract was entered into as alleged by respondent to transport pupils from the Highland School to Lake Stevens, for the agreed compensation of \$1,000 for one hundred and eighty-three days; that respondent entered upon the performance of the contract and transported pupils for eighteen days, when the appellant repudiated the contract, refused to permit respondent to transport pupils any longer, and entered into a contract with another person for the work; that respondent, during that time, performed all of the conditions of the contract required of him to be performed, and held himself in readiness to complete the performance of the contract, but that appellant breached the contract; that the rate of compensation agreed upon for the eighteen days, during which the contract was performed, was \$5.41 per day, and that the balance of the term of one hundred and sixty-five days respondent would have made a profit of \$3.41 per day.

The trial court therefore concluded that respondent

was entitled to recover the sum of \$660.03, and judgment was entered accordingly.

There was a direct conflict in the evidence upon the principal issues, and we have held that, in such cases, where the trial court might have decided either way upon the conflicting testimony, even though a greater number of witnesses may have testified one way than the other, the trial court, having an opportunity of viewing the witnesses and their demeanor and credibility, has a better opportunity to judge of their credibility and of the weight to be given their testimony, and where the evidence does not preponderate against the findings of the trial court we will not disturb its findings. *Barr v. Kerfoot Investment Co.*, 90 Wash. 471, 156 Pac. 392; *Miller v. Reeves*, 101 Wash. 642, 172 Pac. 815.

At the conclusion of the evidence at the trial, the trial court made a very logical and complete summing up of the evidence, and his analysis of the same, as the facts are set forth in the record, is very convincing. From an examination of the record, we are convinced that the evidence does not preponderate against the finding that the contract was made as found by the trial court, and was repudiated by the appellant, and that the respondent is entitled to recover.

Judgment affirmed.

PARKER, C. J., MAIN, and MACKINTOSH, JJ., concur.

Jan. 1922]

Opinion Per HOVEY, J.

[No. 16679. Department Two. January 4, 1922.]

*S. F. WOODY et al., Respondents, v. PORT OF SEATTLE,
Appellant, KING COUNTY, Respondent.*¹

MUNICIPAL CORPORATIONS (22, 23)—PORT DISTRICTS—GOVERNMENTAL POWERS—ABANDONMENT OF SERVICE. The port of Seattle, being a public corporation created by law to exercise governmental purposes, may abandon the operation of a ferry which it finds unprofitable, since it is not subject to the limitations of a private corporation which holds a ferry franchise.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 17, 1921, in favor of the plaintiffs, in an action for equitable relief, tried to the court. Reversed.

Robinson, Murphy & Murphine, for appellant.

Roberts & Skeel, for respondents.

HOVEY, J.—Respondents are residents of a portion of the city of Seattle known as West Seattle and are within the limits of the appellant, Port of Seattle, the boundaries of the latter being co-extensive with those of King county. This last municipality was also made defendant in the action, but the action was dismissed as to it and no appeal has been taken from that portion of the judgment.

For many years ferries have been operated from the city of Seattle proper to West Seattle, and originally they were the only efficient means of transportation between these points, the only other communication being by way of a dirt road. These ferries were originally operated by the Oregon-Washington Ferry and Navigation Company, whose stockholders also owned the company which developed West Seattle. A system of transfers prevailed by which the passengers on the

¹Reported in 203 Pac. 59.

street cars in the city of Seattle could obtain transportation over this ferry for one fare. The traffic on the ferry was quite heavy, both by passengers and vehicles, the expense of operation was moderate, and the ferry was operated at a profit.

In the year 1913, the appellant, Port of Seattle, submitted several propositions of public improvement to its voters by virtue of § 8165-4, Rem. Code, and a comprehensive scheme was adopted by the port officers and submitted to the voters prior to the election, of which scheme the West Seattle ferry unit was a part. The proposition relating to this unit provided for a bond issue of \$200,000 to enable the port to purchase the ferry and the necessary landings. The plan was approved by the voters and the bond issue carried. The port officers sold the bonds, purchased the ferry and the landings, and operated the ferry during the years 1914 to 1919. In developing this project the officers spent the entire bond issue and some \$30,000 in addition, derived from the revenues from other public utilities of the port.

Shortly after taking over the ferry, the operating traffic arrangement of the street railway expired and the port was unable to secure a renewal of it. Thereafter a street car line connecting the main city of Seattle with West Seattle was double tracked and has been elevated through the industrial district, and a street car line which originally operated only in West Seattle and carried passengers to the ferry landing was extended into the city and connected with the street railway system. The highways between the two districts, which were originally in very bad shape, have also been paved. All these circumstances have greatly reduced the amount of traffic carried on the ferry; while, on the other hand, the cost of its operation has in-

Jan. 1922]

Opinion Per HOVEY, J.

creased so that the loss in operation by the port for the years 1914 to 1919, inclusive, was over \$165,000.

In October, 1918, the port entered into a charter agreement with King county for the operation of this ferry and the ferries operated by it on Lake Washington, and on July 23, 1919, the port undertook to sell to the county the property covered by the first agreement, the county undertaking to pay the bond issues. The county commenced operating the ferry under its charter agreement, and its loss for two hundred and eighty-two days, beginning January 1, 1920, was over \$41,000, and it thereupon replaced the "West Seattle" with another boat, and its loss for the balance of the year was over \$7,000, and the county thereupon gave notice of its intention to abandon the use of the ferry at this point. The port is without any funds to meet the deficit arising from future operation and would have to resort to a tax levy to meet it.

The trial court adjudged that the Port of Seattle maintain an efficient ferry service between the points named, and that the defendant King county is not obligated for such service, and further issued a mandatory injunction requiring the appellant, Port of Seattle, to maintain that service.

In support of the judgment of the trial court it is contended that, by the legislation and the acts of the port aforesaid, a trust has been created, not only for the application of the proceeds of the bond issue to the purchase of the property contemplated, but for the continued operation of the property, irrespective of the changed conditions which have since arisen and irrespective of the financial ability of the port to continue the operation, and that the officers of the port are without any discretion whatever in deciding to discontinue the operation of the utility. A number of

authorities are cited where the officers are using funds in violation of the plan as proposed, and a good many cases where there is a failure of service on the part of the public service corporation, but we do not consider them in point here.

The case which seems to come nearest to sustaining the contention of the respondents is *In re Wheeler*, 62 Misc. Rep. 37, 115 N. Y. Supp. 605. In that case the city of New York had taken over a franchise of a private company which granted the right to operate ferries around Manhattan Island to any of the opposite shores, and under it had been operating five certain ferries which it found to be unprofitable and was about to discontinue. The charter in question was granted in the year 1730 and superseded the rights granted under a charter of 1686, and by subsequent legislation the city was given the exclusive right of maintaining ferries. It was held in that case that the original charter was a perpetual franchise protected by the United States constitution against impairment by legislative act, and that, in spite of other legislation upon the subject, the powers of the charter were still in effect.

Another case in which the municipality was held to the fulfillment of the obligation of a charter granted to a private corporation is *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. 137. In that case the complainant was about to be deprived of his only source of supply of water for domestic use.

We do not consider the facts of the present case as bringing it within the preceding cases. Here no obligations of a private charter are taken over, the complainants have street cars on a double track making frequent trips, and a paved road duplicating the ferry, and at most the latter is an added convenience.

Jan. 1922]

Opinion Per HOVEY, J.

Under our laws the handling of ferries is left generally to counties. Rem. Code, §§ 4998 to 5013 (P. C. §§ 2388 to 2403). In the act providing for port districts an added power to maintain ferries is given to these municipal corporations. The section mentioned prohibits the sale of the property embraced in a comprehensive scheme, but there is no provision in the act requiring the officers to continue to operate a utility.

In our opinion, a public corporation created by law to exercise governmental functions is in a different position from a private corporation, even though the latter be vested with certain public privileges and corresponding duties.

“It is not unusual for the legislature to make to a municipal corporation a more or less extensive grant respecting ferries and ferry franchises. Such a grant is not, unless otherwise expressed, a compact which cannot be impaired, but in the nature of a public law, subject to be repealed or changed, as the public interests may demand.” Dillon, *Municipal Corporations* (5th ed.), vol. 1, § 275.

In the case of the public corporation, there is no element of profit to its shareholders. Every detail of its operation can be reviewed by the people and corrected, if desired, by the election of officers for that purpose, or by the act of the legislature, if it sees proper. We think the courts should not interfere with the discretion of the officers of this public corporation as exercised in this instance under the facts of this case.

The order and judgment appealed from will be reversed with directions to dismiss the action.

PARKER, C. J., MAIN, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 16679. Department Two. January 4, 1922.]

**WILLIAM RAINE *et al.*, Respondents and Appellants, v.
PORT OF SEATTLE, Appellant, KING
COUNTY, Respondent.¹**

MUNICIPAL CORPORATIONS (22, 23, 26)—GOVERNMENTAL POWERS—PORT DISTRICTS—OPERATION OF FERRIES—DELEGATION OF AUTHORITY—DISCRETION OF OFFICERS. Where a ferry line which the port of Seattle had been authorized by popular vote to operate was transferred by it to the county, not as a sale of the property but as a delegation of authority to operate, a mandatory injunction will not lie against either the port or the county to compel the maintenance of the service as originally inaugurated, where an alteration in service does not substantially vary the original plan.

Cross-appeals from a judgment of the superior court for King county, Ronald, J., entered March 17, 1921, in favor of the plaintiffs as against one defendant, in an action for equitable relief, tried to the court. Reversed.

Robinson, Murphy & Murphine, for appellant Port of Seattle.

James B. Murphy, for appellants Raine *et al.*

Malcolm Douglas, Wm. Parmerlee, and Arthur Schramm, Jr., for respondent.

HOVEY, J.—This is a companion case to that of *Woody v. Port of Seattle*, ante p. 163, 203 Pac. 59, and the cases were decided by the trial court at one time and were both submitted at the same time in this court.

At the time the Port of Seattle submitted its comprehensive scheme referred to in the preceding opinion, it included a unit for a ferry system on Lake Washington connecting Leschi on the west side of the lake with Medina and Bellevue on the east side of the lake, and a bond issue of \$150,000 was voted by the people for

¹Reported in 203 Pac. 61.

Jan. 1922]

Opinion Per HOVER, J.

that purpose. Thereafter the port equipped a ferry service which it operated at considerable loss, and its property in connection with said unit was covered by the same charter agreement and contract of sale mentioned in the *Woody* case. King county took over the operation of this ferry system and, at the time of the trial, was continuing such operation, but it has announced certain changes in the schedules which will vary the service somewhat from that formerly given, and it is claimed by the plaintiffs that, in addition to being detrimental to their interests, it is also an attempt by King county to aid the service rendered by it under its own ferries operating between Kirkland and Madison street.

In this case the trial court refused relief as against King county, and from that portion of the judgment, the original plaintiffs appeal. As against the appellant Port of Seattle the court issued a mandatory injunction requiring it to maintain "an efficient ferry service, which service shall be as reasonably good as the needs of the residents of Bellevue may require or justify, between the point at or near Leschi Park on the west shore of Lake Washington, and the point at Bellevue established by said port as the point of landing of the said Leschi ferry . . . substantially in accordance with the general plan submitted to the people of said port, and as developed and established by the said port in carrying out the said proposition, including the maintenance of the terminal points."

It appears from the evidence that two points were the eastern termini of this ferry plan. The shortest route to Leschi is Medina, but some two miles from this point and on the same side of the lake is Bellevue. There is a paved road between the places which is connected up with Kirkland, the latter being the terminus of the ferry theretofore maintained by King county.

It was contended by the county that the service they proposed to continue to give to Bellevue, while not as frequent as that formerly given, would yet be sufficient, and that they were going to supplement the service by another smaller boat.

In this case there arises the question of the validity of the sale from the port to the county, and this seems to be forbidden by a provision in § 8165-4, Rem. Code, as amended by the Laws of 1917, p. 501, which reads as follows:

“But no property which is a part of the comprehensive scheme or modification thereof, adopted by vote of the people, shall be sold or disposed of without the assent of a majority of the voters voting on the question of such proposed sale or disposition at a general or special election”

Admitting the illegality of this transfer as a completed sale, we believe the port was within its powers in delegating the operation of the ferries to some one else. They are expressly given the power to lease in the same section, and so long as the use of the property is not changed from the purpose for which the bonds were voted, and in view of the fact that it is being operated by the public body vested by law with the power to operate and control all ferries, we do not think that the respondents can complain. Nor do we think that a variation in the schedules or hours of service from that originally installed by the port is beyond the power of the port officers to exercise their discretion, either directly or through the agency of others.

The operation of this ferry system, both by the port and the county, has also been at a very heavy loss, but as this system of transportation does not seem to be paralleled by any other, the county evidently intends to continue its operation.

As stated in the *Woody* case, there is no provision in

Jan. 1922]

Syllabus.

the act requiring the continued operation of this utility, and neither is there any provision governing the manner of its operation, and so long as the manner of operation is not substantially varied from the plan originally submitted, the persons interested must rely upon political action, rather than proceedings through the courts. We conclude that the evidence did not justify the action of the court in this instance.

The judgment will be reversed, with directions to dismiss the action.

PARKER, C. J., MAIN, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 16658. Department Two. January 4, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v.
FRED GIBBONS, *Appellant*.¹

INTOXICATING LIQUORS (6)—PROHIBITION—UNLAWFUL POSSESSION STATUTES—EIGHTEENTH AMENDMENT. Initiative measure No. 3, as amended by Laws 1917, p. 60, § 11, providing that it shall be unlawful for any person to have in his possession any intoxicating liquor is not nugatory as in conflict with the Federal statute (41 Stat. L., p. 317, § 33) declaring "it shall not be unlawful to possess liquors in one's private dwelling"; inasmuch as the state statute covers the offense of possession away from one's dwelling, and is not superseded by the national law except in so far as it is in conflict therewith.

STATUTES (33-36)—AMENDMENT—TIME FOR—"ENACTMENT" OF STATUTE—CONSTRUCTION. The initiative and referendum provision of the constitution (Const., Amendt. 7) prohibiting the amendment of a law approved by a majority of the electors voting thereon "within a period of two years following such enactment," contemplates the time of its complete enactment in a legal sense; accordingly, a provision of the act itself postponing the time of its taking effect to a later date would not defeat the power of the legislature to amend the act at any time after the expiration of two years from its proclamation by the governor.

¹Reported in 203 Pac. 390.

CRIMINAL LAW (57)—COMPLAINT—ABANDONMENT—NEW COMPLAINT CHARGING HIGHER OFFENSE—RIGHTS OF ACCUSED—JURISDICTION. The abandonment of a prosecution instituted by a prosecuting attorney in a justice court does not militate against his power to file a new complaint charging a higher offense to be tried by the justice as a committing magistrate and thereafter proceed upon proper information filed in the superior court to a trial of the accused for a higher offense of which the latter court alone has jurisdiction.

INTOXICATING LIQUORS (30, 49)—UNLAWFUL POSSESSION—PRIOR CONVICTIONS—EVIDENCE—ADMISSIBILITY. Laws 1917, p. 61, § 15, amending initiative measure No. 3, increasing the punishment for a second violation of the liquor prohibition law, and declaring that a certified record of conviction "shall be sufficient evidence and proof of such previous conviction," is not unconstitutional as an attempt to make such certified record conclusive proof, where it is merely introduced as an evidentiary fact, which the jury are free to weigh as such.

ARREST (6)—ON CRIMINAL CHARGE—AUTHORITY TO ARREST WITHOUT WARRANT. The sheriff has no authority to arrest without warrant one who was not disturbing the peace, and was not suspected of committing a felony, where the sheriff had no actual knowledge that the party arrested was committing the misdemeanor of unlawfully having possession of intoxicating liquor.

INTOXICATING LIQUORS (53)—SEIZURES—VALIDITY—AUTHORITY IN ABSENCE OF SEARCH WARRANT. The seizure without any search warrant of intoxicating liquor in the possession of a person, being in violation of the Federal (amendments 4, 5) and state (art. 1, §§ 7, 9) constitutions, such liquor cannot be produced in evidence against one prosecuted on a charge of having intoxicating liquor in his possession, where the defendant was unlawfully arrested and his automobile seized without any warrant and possession of the liquor was not actually disclosed until examination of defendant's vehicle under a search warrant issued subsequent to his arrest.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered January 18, 1921, upon a trial and conviction of the unlawful possession of intoxicating liquor. Reversed.

John T. Mulligan, for appellant.

W. O. Miller, for respondent.

Jan. 1922]

Opinion Per PARKER, C. J.

PARKER, C. J.—Upon an information filed in the superior court for Adams county by the prosecuting attorney of that county, the defendant, Gibbons, was by a jury found guilty of the offense of unlawfully having in his possession in that county, on December 24, 1920, intoxicating liquor, to wit, twelve quarts of whiskey; the jury further finding that, on November 6, 1918, defendant had been duly convicted in the superior court for Spokane county of the offense of unlawfully having an excess quantity of liquor in his possession, all as charged in the information filed against him in this case. The trial court rendered judgment against the defendant upon these findings, adjudging him guilty of the aggravated offense. From this judgment, he has appealed to this court.

The words, “excess quantity of liquor,” found in the record of the former conviction of the appellant, introduced in evidence in this case, and also found in the information and verdict in this case, indicate that his former conviction was under § 22 of initiative measure No. 3, adopted by a vote of the people in November, 1914, reading as follows:

“It shall be unlawful for any person to have in his possession more than one-half gallon or two quarts of intoxicating liquor other than beer, or more than twelve quarts or twenty-four pints of beer: . . .” Laws of 1915, p. 14; Rem. Code, § 6262-22.

The conviction of the defendant in this case was under §§ 11 and 15, ch. 19, pp. 60 and 61, Laws of 1917, which are amendatory to initiative measure No. 3 of 1914; which sections, in so far as we need here notice them, read as follows:

“Sec. 11. That said initiative measure No. 3 be amended by adding thereto a new section to be known as section 17h and to read as follows:

“Section 17h. It shall be unlawful for any person

. . . to have in his possession any intoxicating liquor other than alcohol. . . .

“Sec. 15. That section 32 of said initiative measure No. 3 be amended to read as follows:

“Section 32. Every person convicted the second time of a violation of any provision of this act, for which the punishment is not specifically prescribed, shall be punished by a fine of not less than two hundred nor more than five hundred dollars and by imprisonment in the county jail for not less than thirty days nor more than six months and every person convicted the third time of a violation of any provision of this act shall, for such third and each subsequent conviction, be punished by imprisonment in the penitentiary for not less than one nor more than five years. Every prosecuting attorney, and every justice of the peace, having knowledge of any previous conviction or convictions of any person accused of violating this act, shall in preparing a complaint, information or indictment, for subsequent offenses, allege such previous conviction or convictions therein, and a certified transcript from the docket of any justice of the peace, or a copy of the record of any court of record, certified by the clerk thereof under the seal of the court, shall be sufficient evidence and proof of such previous conviction or convictions.”

It is first contended in appellant's behalf that § 11 of the act of 1917, above quoted, which is amendatory to initiative measure No. 3 of 1914, is rendered void and of no effect by the passage of the National prohibition law (the so-called Volstead act), which reads in part as follows:

“ . . . it shall not be unlawful to possess liquors in one's private dwelling . . . ” 41 Stat. L., p. 317, § 33.

The argument is that our state law is in conflict with the Federal law touching the possession of liquor in one's dwelling; that is, that the ban of our law rests upon liquor possessed in one's dwelling as well as possessed elsewhere; while the Federal law in terms makes

Jan. 1922]

Opinion Per PARKER, C. J.

possession in one's dwelling lawful; and that therefore the state law must be held of no effect touching the question of unlawful possession of intoxicating liquor. We think that we are not here called upon to enter upon the interesting inquiry as to when, and under what circumstances, if any, state and Federal laws, passed in pursuance of the state and Federal legislative "concurrent power to enforce" the eighteenth amendment to the Federal constitution, may become so in conflict that one of such laws, or some part thereof, must give way to the other. In this case there is no attempt to enforce our state law so as to come in conflict with the Federal law with relation to the possession of liquor in "one's private dwelling." Even conceding here, for the purpose of argument, that as to such possession there is such a conflict as to make one law superior in that respect to the other, the possession of the liquor charged against appellant in this case was concededly not in his private dwelling. We think it is plain that, in so far as our state law is sought to be enforced in this case, it is in no event in conflict with the Federal law. It is conceded by counsel for appellant that:

" . . . the state prohibition law has not been abrogated, suspended or superseded by the National prohibition act, except in so far as the state prohibition law is in conflict with the National prohibition act."

Our late decisions in *State v. Turner*, 115 Wash. 170, 196 Pac. 638, and *State v. Woods*, 116 Wash. 140, 198 Pac. 737, render it plain that such is the settled law of this state.

It is contended that the amendatory act of 1917, above quoted from, and under which this prosecution is being waged, is void and of no effect because it was enacted by the legislature in violation of the provision of the initiative and referendum provision of the seventh amendment to our constitution, reading as follows:

“(c) . . . No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment.”

Initiative measure No. 3 was adopted by the people at the November election of 1914, and such adoption evidenced by proclamation of the Governor on December 5, 1914. The concluding section of that measure and act reads as follows:

“Sec. 33. This act shall take effect and be in full force and effect from and after the first day of January, 1916.” Laws of 1915, p. 17.

The amendatory act of 1917, above quoted from, was passed by the legislature and approved by the Governor on February 19, 1917; more than two years following the vote of the people upon initiative measure No. 3 and the proclamation of the Governor evidencing the adoption of that measure, but less than two years following January 1, 1916, the time of the taking effect of that act by its terms as expressed in § 33 thereof. The argument is, in substance, that the words, “two years following such enactment,” in the above quotation from the seventh amendment to our constitution, mean two years following the time when an initiative measure, by its own terms, is to take effect; and that, since initiative measure No. 3, by its own terms, was not to take effect until January 1, 1916, it could not be constitutionally amended within two years from that date. We cannot agree with this view. The word “enactment,” used with reference to the making of a law, may possibly, under some circumstances, be used in such manner with reference to some act to be done or duty to be performed in pursuance of its terms as to call for its construction as meaning “taking effect;” but we see nothing in the initiative provision of our constitution to

Jan. 1922]

Opinion Per PARKER, C. J.

suggest any such meaning. The word "enactment," with reference to the making of a law, means, under almost all conceivable conditions, the exercise of the legislative power bringing the law into existence. This we think is true, whether such legislative power be the act of the people in making or amending their constitution, the act of the people in making or amending a statute, or the act of a representative legislative body in making or amending a statute. When the people or body possessing such legislative power have completely exercised their power in bringing the law into existence, the enactment of the law has become complete. Whether initiative measure No. 3 was completely enacted in a legal sense, when voted upon by the people in November, 1914, or not until the issuance of the Governor's proclamation evidencing the vote of the people thereon, is not necessary to decide here. That measure, in any event, became completely enacted not later than when the Governor issued his proclamation on December 5, 1914. We conclude that after two years following that date, in any event, initiative measure No. 3 would be subject to be constitutionally amended by the legislature. This, as we have seen, was done by the legislative amendatory act of 1917 here in question; hence that amendatory act was constitutionally enacted in so far as the question of time following the enactment of initiative measure No. 3 is concerned.

Contention is made in appellant's behalf that the superior court erred in putting him upon trial to answer a complaint different from that which was first filed against him in the justice court. On December 24, 1920, appellant was charged by the prosecuting attorney, by a complaint filed with a justice of the peace, with the simple offense of unlawfully having in his possession intoxicating liquor, as being committed on that day. This complaint was filed, apparently looking to a final

trial of appellant in the justice court; but before the case proceeded to trial on that complaint, the prosecuting attorney discovered, as he thought, that appellant had been previously convicted in the superior court for Spokane county of the offense of having an excess quantity of liquor in his possession. The prosecuting attorney thereupon filed another complaint with the same justice, charging appellant as in the first complaint, and also charging such previous conviction. This complaint was filed under § 32 of initiative measure No. 3, as amended by § 15 of the act of 1917, above quoted. The justice then proceeded, upon motion of the prosecuting attorney, to hear the cause as a committing magistrate, evidently being of the opinion that a conviction of appellant of such aggravated offense would call for the infliction of a punishment of a greater degree than a justice court had jurisdiction to finally adjudge. That hearing resulted in an order of the justice, made only as a committing magistrate, holding appellant to answer in the superior court. Thereafter an information was filed by the prosecuting attorney in the superior court, charging appellant with the aggravated offense as in the second complaint filed with the justice, upon which appellant was duly arraigned, plead not guilty, and was tried and convicted.

The argument seems to be that appellant had the right to be tried and finally adjudged guilty or not guilty in the justice court upon the first complaint filed therein; this upon the theory that that complaint charged an offense which the justice court could hear and render a final judgment upon. We fail to see in what respect appellant's rights were in the least prejudiced by the course pursued by the prosecution. Manifestly the superior court had jurisdiction over the aggravated offense for which the appellant was tried upon information filed in that court. The jurisdiction, power

Jan. 1922]

Opinion Per PARKER, C. J.

and duty of that court to proceed to trial upon that information, we think, were not in the least lessened by the election of the prosecution to abandon its first complaint in the justice court and file a new complaint before the justice charging the higher offense, and inducing the justice to hear the cause only as a committing magistrate. Surely the abandonment of a prosecution which has been instituted looking to final judgment in a justice court does not militate against the right and power of the prosecuting attorney and the superior court to proceed, upon proper information filed in the superior court, to a trial of the accused for a higher offense of which the superior court has jurisdiction.

Contention is made in appellant's behalf which we understand to be, in substance, that the superior court erred in receiving in evidence a duly certified record of the superior court of Spokane county evidencing appellant's prior conviction as charged. The argument is addressed wholly to the question of the constitutionality of the concluding language of § 32 of initiative measure No. 3, as amended by § 15 of the act of 1917, above quoted, which is that such certified record of conviction "shall be sufficient evidence and proof of such previous conviction or convictions." It is argued that this provision is unconstitutional, upon the theory that it is an attempt on the part of the legislature to make such certified record of conviction conclusive proof of the previous conviction or convictions sought to be proven. We think, at all events, such argument is wholly without avail here. There is nothing in the court's instructions to the jury, nor elsewhere in the record, indicating that the jury was advised or told that such certified record of conviction was conclusive proof of appellant's previous conviction. It seems plain to us that as long as the jury were left free to find for or against appellant upon the question of his

previous conviction, including, of course, the question of his identity with the person who the record purported to show was previously convicted, no constitutional right guaranteed to him was invaded. The certified record of previous conviction was simply introduced as any other evidentiary fact, and the jury properly left free to weigh it as such. It may have been sufficient to prove such previous conviction, if appellant was identified as the one so indicated as being convicted; but the jury was not compelled, as a matter of law, to so find. This, we think, is all that the statute means.

Some errors are assigned upon the giving of the court's instructions to the jury. These questions, however, are presented to us in such manner as to make their disposition quite unsatisfactory in the light of the record before us. We may observe, however, that one or two of these instructions, especially that numbered 9, are somewhat unfortunately worded. We think it sufficient to here observe that, upon a new trial, the questions presented touching these instructions will hardly be likely to arise. Therefore we pass them without further comment.

We now come to a claim of error, made in appellant's behalf, which we feel constrained to hold must be sustained. It is that the trial court erred in admitting in evidence certain bottles of whiskey taken from the possession of appellant by the sheriff of Adams county without the authority of any search warrant, and at a time when the sheriff had no authority by warrant or otherwise to arrest appellant. On the day in question, appellant drove in an automobile from Spokane to Ritzville. The automobile being stopped on a street in Ritzville for a short time, and the sheriff seeing appellant occupying the driver's seat in it there, suspected that appellant had intoxicating liquor in his unlawful pos-

Jan. 1922]

Opinion Per PARKER, C. J.

session in the automobile. The sheriff thereupon telephoned to his office at the court house and told some one there—presumably one of his deputies—to “get a search warrant for that car;” giving the number of the car. Immediately thereafter, without waiting for a search warrant, and not knowing when one might be issued, and not having any warrant for the arrest of appellant, and having no actual knowledge or visible evidence of the commission by appellant of the offense of unlawfully having intoxicating liquor in his possession, the sheriff stepped upon the running board of the automobile and commanded appellant to drive the car to the court house, at the same time covering appellant with a gun in a threatening manner, causing him to obey the command. In other words, the sheriff then and there arrested appellant and took possession of the automobile and all that was in it. They arrived at the court house some fifteen or twenty minutes later; when the sheriff took from the rear of the automobile a suit case containing the bottles of whiskey in question. In the meantime—just when is not made plain; but certainly some appreciable time after the sheriff had taken possession of the automobile as above noticed—some one at the sheriff’s office had procured from a justice of the peace a search warrant to search the automobile, which search warrant was in the sheriff’s office when he arrived there with appellant and the automobile. The bottles of whiskey in question were first actually brought into view from the suit case, and to the actual knowledge of the sheriff, upon the arrival of the sheriff and appellant at the sheriff’s office.

These events, established beyond dispute by the state’s own witnesses, we have felt the necessity of relating in considerable detail, to the end that the premise upon which we are to decide whether or not the seizure of the whiskey was unlawful, be made plain; since, as

we shall presently see, the lawfulness or unlawfulness of the seizure of the whiskey by the sheriff becomes determinative of the claimed right of the prosecution to introduce it, and the knowledge obtained by the sheriff in its seizure, in evidence in this case against appellant.

It is argued that, when the whiskey was actually brought into view upon the opening of the suit case at the sheriff's office, he then having in his possession a search warrant authorizing him to search for and seize the whiskey, his act at that time must be considered as a then lawful seizure of the whiskey in pursuance of his authority under the search warrant. The fallacy of such a view lies in the fact that the sheriff had, before any search warrant was issued, completely seized and taken into his possession the appellant, the automobile and all that was in it, including the whiskey; though he did not actually see the whiskey until after arriving at the court house. This was plainly an illegal seizure of the whiskey, in so far as want of a search warrant is concerned; and the possession of the sheriff could not be rendered legal by the coming into his hands of the search warrant which was issued after such unlawful seizure.

It is equally plain to us that the seizure of the whiskey was not lawful, as incident to appellant's arrest, as a seizure of evidence of crime incident to the lawful arrest of an accused sometimes becomes lawful; for even the arrest of appellant was unlawful, the sheriff having no warrant therefor. It is not pretended that appellant was suspected of committing a crime amounting to a felony; nor that he was disturbing the peace; nor even that the sheriff had any actual knowledge that appellant was then committing the misdemeanor of unlawfully having intoxicating liquor in his possession. We think the most elementary principles of the law of arrest render it plain that the arrest of ap-

Jan. 1922]

Opinion Per PARKER, C. J.

pellant here in question was unlawful (2 R. C. L. 446-448; 5 C. J. 395); and that therefore the seizure of the automobile and its contents at the time of the arrest had no lawful support as incident thereto.

Before appellant entered his plea of not guilty, his counsel in open court demanded of the sheriff and prosecuting attorney the return of the whiskey seized by the sheriff, and asked the court to make an order accordingly; offering to then prove facts showing the unlawful seizure of the whiskey by the sheriff. This demand was refused, and the application for the order was by the court summarily denied without hearing any evidence. This move by appellant's counsel was, of course, to prevent the introduction of the whiskey in evidence against him upon the trial. Thereafter appellant plead not guilty and the trial proceeded; during which the whiskey was introduced in evidence by the prosecution, over the objection of appellant's counsel, after the facts showing the manner of its illegal seizure by the sheriff, as above related, had fully appeared by the testimony of the state's own witnesses. There is here invoked in appellant's behalf, in support of the contention that the trial court erred in admitting the whiskey in evidence against him, the guaranties of the Federal and state constitutions against unlawful search and the compelling of an accused person to give evidence against himself. These guaranties are expressed in the fourth and fifth amendments to the Federal constitution as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

“No person . . . shall be compelled in any criminal case to be a witness against himself, . . .”

and are expressed in §§ 7 and 9, art. I, of our state constitution, as follows:

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

“No person shall be compelled in any criminal case to give evidence against himself, . . .”

We thus quote from both the Federal and state constitutions to show that these guaranties are in substance the same in both, making the law upon the subject as expounded by the supreme court of the United States, presently to be noticed, a proper aid in our present inquiry, apart from the question of whether or not these guaranties as expressed in the Federal constitution are of themselves controlling of the rights of persons which may be drawn in question in our state courts under our state laws. The question of the introduction against an accused person of evidence the possession of which is unlawfully obtained in violation of his constitutional rights—as was the evidence here in question—has been the subject of extended discussion by the supreme court of the United States in several decisions rendered by that court in recent years. To review those decisions at length here would be to unnecessarily repeat the history of that long struggle for the security of personal rights in the English-speaking world which induced the adoption of these guaranties into the Federal constitution and into most, if not all, of the state constitutions of our Union, and the reasons so learnedly expressed in those decisions for giving these guaranties full force and effect. It seems to us enough for present purposes to take note of the last expression of that great court, found in its recent decision rendered February 28, 1921, in *Amos v. United States*, 255 U. S. 313. That was a prosecution by the government where-

Jan. 1922]

Opinion Per PARKER, C. J.

in the accused was charged "with having sold whiskey on which the tax required by law had not been paid." The facts showing an unlawful seizure of the whiskey, and the holding of the court that the evidence so obtained could not be used against the accused in that criminal prosecution, are best stated in the language of the decision, as follows:

"After the jury was sworn, but before any evidence was offered, the defendant presented to the court a petition, duly sworn to by him, praying that there be returned to him described private property of his which it was averred the district attorney intended to use in evidence at the trial, and which had been seized by P. J. Coleman and C. A. Rector, officers of the government, in a search of defendant's house and store 'within his curtilage,' made unlawfully and without warrant of any kind, in violation of his rights under the 4th and 5th Amendments to the Constitution of the United States.

"Upon reading of this petition and hearing of the application it was denied, and, exception being noted, the trial proceeded.

"Coleman and Rector were called as witnesses by the government and testified: that, as deputy collectors of internal revenue, they went to defendant's home, and, not finding him there, but finding a woman who said she was his wife, told her that they were revenue officers, and had come to search the premises 'for violations of the revenue law;' that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not quite a half-pint of illicitly distilled whiskey, which they called 'blockade whiskey;' and that they then went into the home of defendant, and, on searching, found two bottles under the quilt on the bed, one of which contained a full quart and the other a little over a quart of illicitly distilled whiskey. The government introduced in evidence a pint bottle containing whiskey, which the witness Coleman stated 'was not one of the bottles found by him, but that the whiskey contained in the same was poured out of one of the two bottles that had been found in defendant's house on the bed under the quilt, as stated.'

On cross-examination both witnesses testified that they did not have any warrant for the arrest of the defendant, nor any search warrant to search his house, and that the search was made during the daytime, in the absence of the defendant, who did not appear on the scene until after the search had been made.

“After these two government witnesses had described how the search was made of defendant’s home without warrant either to arrest him or to search his premises, a motion by counsel to strike out their testimony was denied and exception noted.

“This statement shows that the trial court denied the petition of the defendant for a return of his property, seized in the search of his home by government agents without warrant of any kind, in plain violation of the 4th and 5th Amendments to the Constitution of the United States, as they have been interpreted and applied by this court in *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524, in *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915B 834, 34 Sup. Ct. 341, Ann. Cas. 1915C 1177, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. 182, and also denied his motion to exclude such property and the testimony relating thereto, given by the government agents after both were introduced in evidence against him, when he was on trial for a crime as to which they constituted relevant and material evidence, if competent.

“The answer of the government to the claim that the trial court erred in the two rulings we have described is, that the petition for the return of defendant’s property was properly denied because it came too late when presented after the jury was impaneled, and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of defendant’s home had been described, was justified by the rule that, in the progress of the trial of criminal cases courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained.

“Plainly, the questions thus presented for decision

Jan. 1922]

Opinion Per PARKER, C. J.

are ruled by the conclusions this day announced in No. 250, *Gouled v. United States* (254 U. S. —, ante, 311, 41 Sup. Ct. 261) . . . The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon the attention of the court by the government itself. The petition should have been granted; but, it having been denied, the motion should have been sustained.”

A learned and somewhat extended review of this question may also be found in the recent decision of the supreme court of Michigan in *People v. Marxhausen*, 204 Mich. 559, 171 N. W. 557, wherein the law is announced by that court in full harmony with the views of the Federal supreme court, above noticed; and wherein there is in like manner given full force and effect to the guaranties against unlawful search and the compelling of an accused to be a witness against himself, found in the Michigan constitution in substance as those guaranties are found in our constitution. That case involved the seizure of liquor in the home of the accused during his absence, without his consent and without any search warrant authorizing search for or seizure of such liquor. The prosecution failed because the evidence so unlawfully obtained, as it was ruled, could not be lawfully used against the accused.

We note that the case before us does not involve a search or seizure of whiskey in the home of appellant; but manifestly the constitutional guaranty that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law,” protected the person of appellant, and the possession of his automobile and all that was in it, while upon a public street of Ritzville, against arrest and search without authority of a warrant of arrest, or a search warrant, as fully as he would have been so protected had he and his possession been actually inside his own dwelling; that

is, his "*private affairs*" were under the protection of this guaranty of the constitution, whether he was within his dwelling, upon the public highways, or wherever he had the right to be. Our decision in *State v. Jackson*, 83 Wash. 514, 145 Pac. 470, is in full harmony with this view of the law. The reason which supports that decision, it seems to us, is in substance the same as the reason which supports our conclusion here. Upon the trial of that case in the superior court, the prosecuting attorney, in the presence of the court and jury, and over the objection of counsel for the accused, made demand upon him for the production of certain documents in his possession, to the end that they might be introduced in evidence in support of the criminal charge upon which he was there being tried. This was held to be in violation of the guaranty of our constitution that "No person shall be compelled in any criminal case to give evidence against himself." Judge Chadwick, speaking for the court, quoted with approval from *McKnight v. United States*, 115 Fed. 972, as follows:

" 'To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the Constitution of the United States, providing that no person in any criminal case shall be compelled to be a witness against himself.' "

If it be the law, as it clearly is, that the prosecution has no right to make such a demand upon an accused in the presence of the jury before which he is being tried, such demand suggesting that what is sought will be incriminating evidence against the accused, how can it be said that evidence procured in an unlawful manner through the violation of an accused's constitutional

Jan. 1922]

Opinion Per HOLCOMB, J.

guaranty against unlawful search and seizure may be used against him, as was done in this case?

Because of the error of the trial court in admitting in evidence the whiskey so unlawfully taken from the possession of appellant, the judgment is reversed and appellant granted a new trial. The cause is remanded to the superior court for such further proceedings as shall not be inconsistent with the views herein expressed.

HOLCOMB, HOVEY, MAIN, and MACKINTOSH, JJ., concur.

[No. 16586. Department Two. January 6, 1922.]

PARKER ADAMS, *Respondent*, v. EDWARD J. HARRIS *et al.*,
Appellants.¹

DEEDS (17-1, 61)—DELIVERY—EVIDENCE—SUFFICIENCY. The delivery of a deed to a third person to hold until the grantor's death and then record and deliver to the grantee is a valid delivery, where there is no reservation by the grantor of the right to re-take it or control its use; and the declaration of the intermediate holder of the deed that she would have delivered it back to the grantor, if requested by him, would be insufficient to affect the sufficiency of the delivery.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered November 1, 1920, in favor of the plaintiff, in an action to set aside a deed, tried to the court. Reversed.

Crass & Hardin, for appellants.

W. W. Sparks and *F. W. Tempes*, for respondent.

HOLCOMB, J.—This is an action to annul and set aside a certain deed to certain real estate in Vancouver,

¹Reported in 203 Pac. 48.

Washington, and have the real estate decreed to be a part of the estate of Edward J. Adams, deceased.

Edward J. Adams, deceased, was an aged, single man, and during the last few months of his life resided with a niece, Mrs. Gillott, in Vancouver, Washington.

On December 19, 1919, he executed the deed in question before a notary public, conveying the real estate described therein to these appellants. On December 23, 1919, he handed to his niece, Mrs. Gillott, a package of papers, requesting her to take charge of the same, and instructing her that, if anything happened to him, she was to see that the deed to the property herein involved was placed on record immediately and returned to the Harris boys, two of the appellants in this case. Mrs. Gillott took the papers, placed them in the drawer of a bureau that was then in the sitting room, which room was also being used as the bedroom of deceased. Mr. Adams died on Sunday night, February 10, 1920. On the Friday night before that, in a conversation with Mrs. Gillott, Mr. Adams told her that some improvements were being urged on the buildings on the property which he had deeded to the Harris boys, which he called the "barn property", but that he would never make any improvements thereon, and the Harris boys could do as they pleased about improvements after his death. A short time before his death, Mr. Adams had consulted a physician and had been informed that his condition was critical and that he had better put his business affairs in order, and he told Mrs. Gillott that he did not expect he would live long, and again requested her not to forget the deed to the "barn property" which he had made to the Harris boys. From the time he gave the papers to Mrs. Gillott, Mr. Adams never requested them to be returned to him, or in-

Jan. 1922]

Opinion Per HOLCOMB, J.

quired about them in any manner whatever. A short time after he had executed the deed, he stated to Emory P. Harris that he had deeded the property known as the "barn property" to Asa Harris, Ed Harris, Rosa Fowler, and Will Adams.

Respondent and the trial court attach great importance to the answer of Mrs. Gillott upon cross-examination wherein she was asked if she had been asked by Mr. Adams to return the papers to him, if she would have done so, and she answered, "Yes", and "I suppose so."

The question to be determined in this case is, therefore, was there a delivery of the deed?

"Actual manual delivery and change of possession are not required in order to constitute an effectual delivery. But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case. Where a father had indicated in various ways that certain property should be bestowed at his death upon his infant son, and for that purpose had executed a deed, of which he, however, retained the possession, effect was given to his intention, despite the fact that there had been no manual delivery of the deed. 1 Devlin, Deeds (2d ed.), § 269."

Matson v. Johnson, 48 Wash. 256, 93 Pac. 324, 125 Am. St. 924.

In *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756, we held that there is a valid delivery of a deed where it is deposited with a bank to be held during the grantor's lifetime and delivered after his death to the grantee, where it further appears that a clause in the deed so provided and appointed the bank the grantor's agent to make such delivery, with the same force and effect as if delivered by the grantor during his lifetime.

The fact that the deed itself, in the above cited case, contained a recital that it was to be held by the bank

as agent for the grantor, and to be delivered by the bank to the grantee upon the death of the grantor, only evidenced the creation of the agency in writing, rather than orally, as here.

True, we held in *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042, that, "It is elementary that a deed cannot perform the functions of a will, hence cannot be effectually delivered after the grantor's death." But we also there said:

"When, however, the grantor delivers the deed to a third person in escrow to be held until the grantor's death and then delivered to the grantee, the grantor retaining no dominion or control over it, the delivery is valid and an immediate estate is vested in the grantee at the date of the delivery in escrow, subject to the grantor's life estate."

As we said in *Maxwell v. Harper*, *supra*:

"It should be noted, however, that the grantor intended the deed to serve some lawful purpose, and did not understand himself to be performing an idle act in executing and depositing it with the bank."

We attach no importance to Mrs. Gillott's statement that had the deceased, during his lifetime, called for the deed she would have turned it over to him. The fact is the deceased gave it to her, apparently with the settled intention that she was to attend to the recording of it after his death and deliver it to appellants; that he did not intend to, and certainly did not, exercise any control whatever over it.

In *Maxwell v. Harper*, *supra*, it was said:

"Assuming that the two cashiers . . . did in fact regard the deed as being in the custody of the bank subject to the dominion and control of W. A. Maxwell and that they would have returned it to him had he so requested, such a mistaken view entertained by them as to their duty in the premises would not

Jan. 1922]

Opinion Per HOLCOMB, J.

avoid the deed or its delivery. *White v. Watts*, 118 Iowa 549, 92 N. W. 660.”

What was lacking in the case of *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240, and *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042, was clearly shown in this case, that is, the intention on the part of the grantor to dispose of the title to the real estate in question, reserving a life estate in himself, as was the case in *Maxwell v. Harper, supra*, to take effect upon his death, to the grantees named in the deed.

We think it was clearly shown that the deceased parted with all dominion and control over the deed. He had also made disposition of others of his properties in the same manner, as is shown by the evidence in the case. He had, in fact, made a deed to another of his nieces, which he took back a short time before his death with the probable intent of changing it, which deed was found in his pocket after his death, and that deed was recorded and given effect.

The credibility of Mrs. Gillott as a witness is questioned by respondent, but viewing her as a niece of the deceased, who would be benefited if the deed to the property in question were annulled, it would seem that greater weight should be given to her testimony.

The case falls within the rule of *Maxwell v. Harper*, and *Matson v. Johnson, supra*; *Thatcher v. Capeca*, 75 Wash. 249, 134 Pac. 923; *Simmons v. Macomber*, 60 Wash. 469, 111 Pac. 579.

The decree is therefore reversed, with instructions to enter a decree in favor of appellants.

PARKER, C. J., MAIN, BRIDGES, and HOVEY, JJ., concur.

[No. 16902. Department One. January 6, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Frank L. Deignan et al., Plaintiff, v. EVERETT SMITH, as Judge of the Superior Court for King County, Respondent.*¹

STIPULATIONS (2)—CONSTRUCTION AND OPERATION. An agreement, entered into on the trial of an action, not to issue an execution on the judgment that may be obtained therein until the trial and determination of another pending action, is sufficient to support an order staying execution on the judgment thereafter entered in the prior action, where the conditions of such agreement had not been complied with.

Application filed in the supreme court October 31, 1921, for a writ of mandamus to compel the superior court for King county, Smith, J., to grant plaintiffs' motion for the appointment of a commissioner to cancel certain mortgages. Denied.

James T. Lawler, for relators.

Thorwald Siegfried, for respondent.

FULLERTON, J.—This is an application originally instituted in this court for a writ of mandamus. From the very meager record before us we gather the following facts: The relator Frank L. Deignan performed services as agent for one Olga W. Soelberg. Deignan, his wife joining in the complaint, instituted an action against Mrs. Soelberg and another to recover a balance claimed to be due for the services rendered. The defendants in that action counterclaimed for money received by Deignan which had not been accounted for, and for money loaned to him by one Peter Wickstrom, evidenced by notes secured by mortgages on the plaintiffs' real property, which notes and mort-

¹Reported in 203 Pac. 373.

Jan. 1922]

Opinion Per FULLERTON, J.

gages had been assigned to the defendants. A trial of the issues resulted in a money judgment in favor of the plaintiffs for the sum of \$24.12, and a judgment annulling and cancelling the notes and mortgages mentioned. The judgment further directed the holder of the mortgages to cancel the same of record within ninety days from the date of the judgment, and provided that, in case of a failure or refusal so to do, the plaintiff could apply to the court for the appointment of a commissioner for that purpose. After the expiration of the ninety day period, the mortgages not having been canceled by their holder, the plaintiffs applied to the court for the appointment of a commissioner to cancel them. This application was resisted by the defendants, who also, at the same time, applied for stay of execution on the judgment until the further order of the court. The court, on the hearing, denied the application of the plaintiffs and granted that of the defendants.

The relief sought in this court is a writ directed to the lower court demanding it to grant the motion of the plaintiffs for the appointment of the commissioner. The reason assigned for the issuance of the writ is that no sufficient cause, either of law or of fact, is shown justifying the stay granted by the court. In opposition to the plaintiffs' motion, and in support of their own, the defendants filed the affidavit of their attorney. In substance, the affidavit recites that, at the time of the trial of the action in question, the defendants had another action pending against one Buckley for an injury committed by him to their lands; that counsel then representing them also represented them in the action against Buckley, and that the plaintiffs' counsel in the action on trial represented Buckley in the other action; that it developed in the cross-examination of the plaintiff Frank L. Deignan that he, as

the agent of the defendants, had consented to the acts of Buckley which caused the injury for which they were suing Buckley; that, conceiving this act of Deignan rendered him liable along with Buckley for the injury committed to their real property, and conceiving further that a judgment in the case on trial, entered after they had acquired knowledge of plaintiffs' liability, might be a bar to an independent action against him for the injury, they sought leave to amend their answer by setting up his liability, as an additional defense and counterclaim to the action then on trial; that, in order to avoid delay in the pending trial, it was stipulated and agreed between the parties that Deignan might be made a party defendant in the action against Buckley, and that that action should be tried without being subject to any prejudice that might otherwise arise by the judgment to be entered in the action then on trial, and that execution should be stayed on any judgment so entered until the trial and determination of the other action. An answering affidavit was filed in which the defendants' affidavit was denied in toto, save that it was admitted "that affiant agreed that the defendant herein would not be prejudiced in (the Buckley action) seeking to hold the plaintiff herein liable, in view of defendant's attempt to try the issue in this cause, . . . and was willing to agree and did agree that the defendant would not be estopped from joining Frank L. Deignan with Cornelius C. Buckley in said cause." The matter coming on to be heard on these affidavits, the court was not satisfied therewith and required the parties to furnish it with a transcript of so much of the testimony given in the trial as bore upon the question, and, upon this being furnished, entered the order as before stated.

In this court the applicant for the writ has brought before us only the affidavits filed—the transcript fur-

Jan. 1922]

Opinion Per FULLERTON, J.

nished the trial court not being a part of the record. We must assume, therefore, that the transcript supported the defendants' version of the transaction. Stated in its broadest aspect, the question then is, will an agreement, entered into on the trial of an action, not to issue an execution on the judgment that may be obtained therein until the trial and determination of another pending action, support an order staying an execution on the judgment thereafter entered, the conditions of the agreement not then having been complied with. It seems to us that it will. The agreement was one competent for the parties to make. It was founded on a substantial consideration, in that one of the parties, on the faith of the agreement, forebore what was to them a substantial right; a right which cannot now be denied them without the possibility of an irreparable injury. The agreement was not such an agreement as inhered in the action on trial, but was independent thereof and was not concluded by the final judgment entered therein. We can, therefore, see no legal reason why the agreement should not be enforced.

The writ will be denied.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 16736. Department One. January 6, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. INGRAM
RADER, *Appellant*.¹

HOMICIDE (110-112)—TRIAL—INSTRUCTIONS—JUSTIFICATION. In a prosecution for homicide, where the defense was that the act was justifiable, the omission by the court of the element of justification in its charge to the jury defining the degrees of murder was error, notwithstanding an attempt in later instructions to define justifiable homicide.

SAME (110, 111-1)—JUSTIFIABLE HOMICIDE—INSTRUCTIONS—MISLEADING INSTRUCTIONS. In a prosecution for homicide where there was no evidence that the deceased had endeavored to withdraw from the fight, nor that the killing was done through motives of anger or fear after a change of circumstances had freed the defendant from danger, an instruction that under such circumstances the killing was not justifiable was misleading and erroneous, as assuming facts not in the case.

SAME (14-18) — JUSTIFIABLE HOMICIDE — SELF-DEFENSE—DUTY OF DEFENDANT. A person on his own premises may defend himself from an unprovoked assault with any means within his command even to taking the life of his assailant, if the assault is of such a nature as to cause him reasonably to believe that he is in danger of his life or of great bodily harm.

SAME (121)—TRIAL—INSTRUCTIONS—GRADE OR DEGREE OF OFFENSE—NECESSITY. In a prosecution for murder in the first degree, it is error to refuse a requested instruction in the language of Rem. Code, § 2308, that where an offense has been proved against a person and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest; and the same is not cured by a verdict of second degree murder, since manslaughter is a degree within the crime of murder.

CRIMINAL LAW (306)—TRIAL—ABSTRACT INSTRUCTIONS. An instruction in a criminal case upon confessions and admissions is erroneous, though correct as a proposition of law, where there is no evidence justifying such instruction.

Appeal from a judgment of the superior court for King county, Hall, J., entered January 11, 1921, upon a trial and conviction of murder. Reversed.

¹Reported in 203 Pac. 68.

Jan. 1922]

Opinion Per FULLERTON, J.

John F. Dore, for appellant.

Malcolm Douglas and *John D. Carmody*, for respondent.

FULLERTON, J.—The appellant, Rader, was informed against for murder in the first degree, for killing one Bud Dean Curtis. At the trial, the jury returned a verdict finding him guilty of murder in the second degree. This appeal is from the judgment and sentence pronounced on the verdict.

The errors assigned relate solely to certain instructions given by the court to the jury, and to the refusal of the court to give certain requested instructions. To an understanding of the pertinency of the objections made, a brief review of the facts is necessary. In the early part of the year 1920, the appellant, together with one Knight, was engaged in the wood business near Lake City, in King county, under the firm name of Ranight Fuel Company. Near the middle of January, 1920, Curtis and his wife entered the employment of the company. Curtis worked in the woods, and Mrs. Curtis kept the books of the concern, and with her sister, Mrs. Patterson, whose husband was also in the employ of the company, attended the telephone calls. Mrs. Curtis seems also at times to have worked at manual labor in the wood yard. On February 8, following, Curtis and Patterson quit the employment of the fuel company, leaving their wives at the fuel company's place of business; the wives continuing in the duties they had theretofore performed. Between this time and the time of April 2, 1920, both Curtis and Patterson visited their wives, but whether once or more the evidence of the wives disagrees. It is in evidence, however, that Curtis came to the place of business on the Friday of April 2, and in the presence of Mr.

Knight, Mrs. Patterson and the appellant, endeavored to persuade Mrs. Curtis to go away with him. On her refusing so to do, he turned to the appellant and accused him of interfering with his family affairs, saying to the appellant that he had broken up his home, and that when he came for him he would need his gun. Curtis then packed certain of his personal belongings in a valise and left the place. He returned the next day shortly before the noon hour, in the company of a truck driver who came to the place for wood. At this time Mrs. Curtis was working in the wood yard ricking wood. The appellant was driving a team, dragging logs from the woods into the wood yard. Several other persons were engaged in duties in and about the yard. Curtis, on reaching the yard, got down from the truck, went over to his wife and engaged in a conversation with her. While so conversing, the appellant came into the yard driving the team. Curtis started towards him, saying, "Rader, get your gun, I am coming after you," pulling off his coat at the same time. The appellant apparently made no effort either to get away or defend himself, and Curtis on reaching him struck him, knocking him down. Curtis then turned to his wife, put his arm around her and entreated her to go away with him. The appellant then got up, went to his office tent some distance away and procured a revolver, which he put into his pocket. He then returned to the wood yard. Curtis in the meantime had gone to the loading platform and was assisting the truck driver mentioned in loading the truck with wood. When he saw the appellant returning, he got down from the loading platform and started towards the appellant. The appellant turned to one side, telling Curtis to keep away. Curtis continued his advance, when the appellant took the revolver from his pocket, telling him to stop. Curtis kept

Jan. 1922]

Opinion Per FULLERTON, J.

advancing, at the same time picking up rocks and sticks and hurling them at the appellant. The appellant then fired three shots, the third of which struck Curtis in the groin. Curtis was then close upon the appellant, and lunging forward, grabbed him around the lower part of the body and raised him from the ground. While in this position the appellant fired two shots into Curtis' back; Curtis dying from the effects of the shots a few hours thereafter.

The foregoing facts are gathered from the testimony of the witnesses for the state; the appellant did not testify himself, nor did he call any witnesses on his own behalf.

The statute defines homicide as follows (Rem. Code, § 2390; P. C. § 8995) :

“Homicide is the killing of a human being by the act, procurement or omission of another and is either (1) murder, (2) manslaughter, (3) excusable homicide or (4) justifiable homicide.”

Murder in the first and second degrees is defined, in so far as the definitions are applicable here, in the following language (See Rem. Code, §§ 2392, 2393) :

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed . . . with a premeditated design to effect the death of the person killed. . . .”

“The killing of a human being, unless it is excusable or justifiable, is murder in the second degree when . . . committed with a design to effect the death of the person killed, . . . but without premeditation, . . .”

Manslaughter is defined (Rem. Code, § 2395; P. C. § 9000) :

“In any case other than those specified . . . homicide, not being excusable or justifiable, is manslaughter.”

The appellant, in writing, requested the court to instruct the jury in the statutory language on the different degrees of homicide. This the court declined to do, but gave the following:

“Under the laws of this state the killing of a human being is murder in the first degree when committed with a premeditated design to effect the death of the person killed.

“Premeditated means thought over beforehand and for any appreciable length of time, however short. When a person, after any deliberation, forms a design to take human life, the killing may follow immediately after the formation of the settled purpose and it will be murder in the first degree. The law requires some space of time in which a design to kill is deliberately formed.

“Murder in the second degree, is the killing of a human being when committed with a design to effect the death of the person killed but without premeditation.

“The killing of a human being, unless it is excusable or justifiable, is manslaughter when it is committed without design to effect death and without premeditation.

“Before you are entitled to find the defendant guilty of murder in the first degree, as charged in the information, the state must convince you beyond a reasonable doubt of all the following elements of that crime:

“1. That the defendant, on or about the 3rd day of April, 1920, did shoot and inflict wounds upon Bud Dean Curtis with a revolver pistol;

“2. That the defendant did this act with a premeditated design to effect the death of said Bud Dean Curtis;

“3. That as a result of the said wounds so inflicted the said Bud Dean Curtis died on or about said 3rd day of April, 1920;

“4. That the said act upon the part of the defendant occurred in King county, state of Washington.

“If you find from all the evidence admitted in this case that the state has proved beyond a reasonable

Jan. 1922]

Opinion Per FULLERTON, J.

doubt each and all of the foregoing elements of the crime charged in the information, then it will be your duty to return a verdict of guilty of murder in the first degree, so charged in the information herein.

“Everyone is presumed to intend the natural and necessary consequences of his actions. If one kills another he must, in the absence of a showing to the contrary, be presumed to have intended to kill him. So, if you find from the evidence beyond a reasonable doubt that the defendant killed Bud Dean Curtis, as charged in the information, then the presumption of law is that the defendant is guilty of murder in the second degree; and before you would be justified in rendering a verdict of murder in the first degree, the state must establish beyond a reasonable doubt the additional element that the shooting was done with a premeditated design to effect the death of said Bud Dean Curtis.”

Nothing further was said in the instructions concerning the crime of manslaughter, other than that a verdict of manslaughter was one of the verdicts the jury were warranted in returning.

The appellant complains of these instructions, we think justly. Murder in any form is the felonious killing of a human being. It is a killing without justification or excuse, yet all reference to this element is omitted by the court in its definition of murder in the first and second degrees. Under the instructions as given, the appellant could have been found guilty of murder either in the first or in the second degree, no matter how clear his justification for the killing might appear. Nor does the instruction contain any reference to the fact that there are modifications to the positive precepts there laid down. The omissions are especially harmful in the present case. The killing was admitted; the sole contention being that it was justifiable. The facts were such that the jury could have found, without a violation of its oath, that the killing was justifi-

able. Plainly, we think the appellant was entitled to have the element of justification called to the attention of the jury in its definitions of the degree of murder, especially since he in writing requested it.

It is true that later on in its instructions the court did attempt to define justifiable homicide, but we cannot think this in any way cured the defect in the original instruction. It was given as an independent instruction without reference to the previous instruction, and consequently without indication that it was a modification of the previous instruction. Indeed, the jury were not even told that, if they found the particular killing justifiable within the principles announced, they should find the appellant not guilty. Moreover, the instruction was faulty in another respect. It announced principles, correct enough perhaps in the abstract, yet principles which had no bearing upon the facts of the particular case. A part of the instruction was as follows:

“ . . . and if a man is assaulted by another, no matter how bad or violent the character of the assailant, or how menacing his actions, or how imminent the danger may have been at one time during the affray, yet if the danger, once so apparently present and actual, has ceased, or if the assailant has in good faith endeavored to withdraw from the fight and there is no longer good reason for believing that the threatened danger exists, then the assailed who kills thereafter, when there is no reasonable ground, under the circumstances, for apprehending danger at the time of the killing, would not be justified. There may be, and are, cases and affrays wherein a slayer might be justified in slaying at one time during the affray, and not having done so, the circumstances may have been so changed that a slaying later, even though during the same affray, might not be justifiable. A man who has been assaulted ever so violently and whose life may have been in ever so great a danger, but who has not struck

Jan. 1922]

Opinion Per FULLERTON, J.

the fatal blow, and who by reason of a change in circumstances may be reasonably freed from the threatened danger, would have no right, after being thus freed from danger, to kill through motives of anger or fear, or of apprehension that at some time in the future he might be again the victim of assault."

This, it seems to us, could easily be misleading. The language is too general to apply to any fact in the case in hand. There is in the record no evidence that the assailant had at any time, in good faith or otherwise, endeavored to withdraw from the fight, nor is there any evidence that the killing was done through motives of anger or fear after a change in the circumstances had freed the appellant from danger. On the contrary, the evidence showed that the person killed was the aggressor in both assaults, and that he was killed while actually engaged in the second assault, and at a time when the jury could well have found that his manner and conduct indicated that his purpose was to inflict upon the appellant great bodily harm. A charge assuming that the facts were different from these was improper, and, as we have suggested, liable to a misleading interpretation on the part of the jury. It may be that the court gave the instruction because of the fact that the appellant left the scene of the affray after the first assault and returned later with a deadly weapon in his pocket. But if the instruction was intended to cover this phase of the case, the language was inappropriate. Whether this was a wrongful act upon the part of the appellant depends upon his purpose in so returning. If his intent in returning was to provoke another assault, and use that as an excuse for killing his assailant, then the killing was not justifiable. If his purpose was to pursue his ordinary business and use the weapon only in the case of an assault upon

him, putting him in danger of his life or great bodily harm, then his act was justifiable. A man may lawfully go where he has the right to go. He does not have to abandon or keep away from his place of business merely because another is there bent upon doing him a bodily harm. Nor is any man required to engage in a physical combat with another. While he has no right to provoke an assault, he may defend himself from an unprovoked assault with any means within his command, even to taking the life of his assailant, if the assault is of such a nature as to cause him reasonably to believe that he is in danger of his life or of great bodily harm. In the present case, an instruction covering these features might have been appropriate. But it should have been given in language capable of direct application, not in the very general language used by the court.

The statute (Rem. Code, § 2308; P. C. §9139) provides:

“Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest.”

The appellant requested an instruction couched in the foregoing language. This the court declined to give as a whole, giving only that part of it which relates to the presumption of innocence. This was error, and was not cured by the verdict returned. Manslaughter is a degree within the crime of murder, and the request was not only within the statute, but within the general rule of law.

The court gave an instruction upon confessions and

Jan. 1922]

Opinion Per FULLERTON, J.

admissions, of which the appellant complains. The complaint is that there was no evidence justifying such an instruction. With this we agree. Nothing bearing upon the nature of a confession or admission was shown, and while the instruction was correct in the abstract, it should not have been given. An abstract instruction, however correct it may be as a proposition of law, does not enlighten the jury as to the law of the particular case. Such an instruction is not, of course, always so far prejudicial as to require reversal, yet it can have no other tendency, and this furnishes the reason for its avoidance.

Other instructions are complained of, one of which was given at the request of the defendant. Of the first, it is sufficient to say that we find no error in them; and of the second, that it is not a matter of which the appellant can here complain.

For the errors indicated, the judgment is reversed and a new trial awarded.

PARKER, C. J., MITCHELL, BRIDGES, and TOLMAN, JJ., concur.

[No. 16737. Department One. January 6, 1922.]

MAIRIAM S. MOLIN, *Respondent*, v. A. S. ANDERSON,
Defendant, NEW AMSTERDAM CASUALTY
COMPANY, *Appellant*.¹

PRINCIPAL AND SURETY (8)—LIABILITY—FRAUD OF OBLIGEE—EVIDENCE—SUFFICIENCY. The obligee under a building contractor's bond is not chargeable with fraud in failing to notify the bonding company that the contractor was in default on his contract and had already been paid a considerable sum thereon, it being the bonding company's privilege to inquire, and not the obligee's duty to volunteer the information.

SAME (8)—LIABILITY—FRAUD OF OBLIGEE—KNOWLEDGE OF FACTS AS CONSTITUTING FRAUD. Where a contractor's bond was given to protect the owner under a contract calling for the erection of four dwelling houses, the fact that the building contract recited that all the houses were on one street, while in fact one of them was on another street in the same block, would not constitute a defense against the bond where the bonding company by investigation could readily have learned the fact, it further appearing that the surety was not misled to its injury, since the total cost was not increased.

SAME (19)—EXTENT OF LIABILITY—PERFORMANCE—BUILDING CONTRACTS. The fact that a contractor's bond was written after the work on the houses covered thereby had been commenced would not affect liability under the bond, where it was conditioned that the contractor should perform the whole contract and not a part of it.

SAME (40)—DISCHARGE OF SURETY—FAILURE TO GIVE NOTICE. Notice to a surety on a building contractor's bond of his abandonment of the contract, given by the obligee twenty-three days after learning thereof, is within a reasonable time, under a provision of the bond calling for formal notice immediately after knowledge of the default of the contractor, where the surety already had knowledge of the default and there is no showing of injury or damage because formal notice was not sooner given.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 28, 1921, upon findings in favor of the plaintiff, in an action on a contractor's bond, tried to the court. Affirmed.

¹Reported in 203 Pac. 8.

Jan. 1922]

Opinion Per BRIDGES, J.

Ogden & Clarke, for appellant.

Jacob Kalina and Preston, Thorgrimson & Turner, for respondent.

BRIDGES, J.—This was a suit upon a building contract bond. The defendant casualty company has appealed from a judgment against it.

It is first contended by the appellant that respondent cannot recover because she was guilty of fraud, actual or legal, in procuring the bond. This requires us to make an examination of the facts: On the 24th day of October, 1918, respondent entered into a written contract with Anderson for the construction by the latter for the former of four dwellings in Seattle. The houses were to be completed by January 20, 1919. The contract did not provide for any bond. The testimony, however, convinces us that, shortly after Anderson started work on these dwellings, the respondent demanded or requested of him a bond for the faithful performance of the contract, and that he agreed to give it, but that it was not given until December 21, 1918, although respondent had more than once demanded it. On that day Anderson was asking for more money than respondent thought he had earned, and the latter refused to make that payment till the bond was furnished. Thereupon Anderson visited the appellant's agents in Seattle and obtained the bond sued upon and delivered it to the respondent. Neither she nor any person for her was present when the bond was applied for or written, nor did she, or any person for her, make any representations to appellant or its agents concerning the contract or the work done under it. The trial court made findings in accord with the facts as we have stated them. It is plain, therefore, that respondent was not guilty of any active fraud.

But it is argued that although respondent did not make any representations to the appellant concerning the contract or bond, yet she had knowledge of certain facts and circumstances which she was bound to impart to the appellant, and her failure to do so would amount to a fraud. It is contended that, at the time the bond was written, the respondent knew that Anderson had not paid a large amount of the bills contracted by him, and that he was in default on his contract, and that he had already been paid large sums. We do not find anything which indicates that respondent knew that the contractor had not paid his bills. It is true, the contractor brought her a lot of receipted bills which respondent testified were fraudulent. But she did not learn they were fraudulent till long after this bond was given. If appellant was interested in knowing how much the contractor had been paid before the bond was made, it was its privilege to inquire, and not respondent's duty to volunteer the information. Indeed, there is nothing in the record to show that appellant, at the time it wrote the bond, did not know exactly the facts surrounding the whole transaction. In its brief appellant says: "This case, in its last analysis, simply presents this question: Does the court believe Molin's story?" The lower court, who had the witnesses before it, believed her story and manifestly disbelieved most of the testimony given by the contractor, Anderson. The agent who made the bond had died before the trial. We are unable to see anything which would indicate to us that the trial court was wrong in believing respondent's testimony. The written contract between the respondent and Anderson provided that the four dwellings were to be constructed on 24th avenue north, between Graham and Lynn streets, in Seattle, on property belonging to

Jan. 1922]

Opinion Per BRIDGES, J.

the respondent. The actual agreement, however, between the parties was that three of the houses were to be built on 24th avenue, and one was to be built on 25th avenue, and before the contract was signed, this error was discovered and attempted to be corrected by Anderson indorsing on the contract the following words: "This contract is changed to read that one of these bungalows that should be on 23rd street is to be located on 24th street, as described by error." It will be observed that the written indorsement was itself wrong, and did not make the contract comply with the agreement of the parties. The bond recited that it was for the performance of the contract to build four dwellings on 24th avenue. The appellant contends that, under these circumstances, it should not, in any event, be liable for the house on 25th avenue. The bond was not issued until nearly two months after the date of the contract, and for several weeks after the commencement of the work on all the houses in question. Under these circumstances, if the appellant made any investigation at all at the time it wrote its bond, it must have learned that one of the houses was being constructed on 25th avenue. In any event, the testimony shows that it would not have cost the contractor any more to build one of the houses on 25th avenue than on 24th and, consequently, appellant could not have been misled to its injury. *Segari v. Mazzei*, 116 La. 1026, 41 South. 245.

Appellant also contends that it should not be held liable for loss which occurred prior to the issuance of the bond. We are unable to see any merit in this contention. The condition of the bond was that the contractor should perform the whole contract and not a part of it. The mere fact that the bond was written after the work on the houses had been commenced could not affect the liability on the bond.

The bond provided that, "the surety shall be notified in writing of any act on the part of said principal . . . which may involve a loss for which the surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said owner . . . and a registered letter mailed to the president of the surety at Baltimore, Maryland, shall be the notice required within the meaning of this bond."

The testimony shows that, on the 18th of January, 1919, the respondent learned that the contractor had abandoned the work; the formal written notice to the appellant of such abandonment was given on February 10. In other words, the formal notice was given twenty-three days after the respondent learned that the contractor had abandoned the job. It is contended that the respondent should not be permitted to recover because she did not give the notice within the time provided by the bond. Ordinarily speaking, under a provision of the character here in question, it is the duty of the owner to give the notice within a reasonable time after he has learned of the default. The testimony shows that appellant had knowledge of the default of the contractor before it received the formal written notice, and there is nothing to show that it was injured or damaged because the formal notice was not sooner given. Under these circumstances, it is plain that the notice was given within a reasonable time.

The judgment is affirmed.

PARKER, C. J., FULLEBTON, MITCHELL, and TOLMAN, JJ., concur.

Jan. 1922]

Opinion Per TOLMAN, J.

[No. 16755. Department One. January 6, 1922.]

G. WARREN, *Respondent*, v. W. W. SHEANE AUTO
COMPANY, *Appellant*.¹

FRAUD (13)—ACTIONS — PLEADING — COMPLAINT. An action for damages based upon false and fraudulent representations inducing the sale of a motor truck, is not based upon a warranty, express or implied, and may be maintained regardless of the vesting of title, or knowledge of the falsity of the representations.

FRAUD (9)—SALES (107)—IMPLIED WARRANTY—SECOND-HAND MACHINERY. Though there may be no implied warranty on the sale of a second-hand article, one who makes false and fraudulent representations inducing its sale cannot escape liability for the fraud.

APPEAL (396)—REVIEW—PRESUMPTIONS—INSTRUCTIONS. On appeal from a judgment based on a verdict, it will be assumed, in the absence of the instructions, that questions of fact upon which reasonable minds might differ were properly submitted under correct instructions.

ELECTION OF REMEDIES (3)—ACTS CONSTITUTING ELECTION—MISTAKE IN REMEDY. The resort to the mistaken remedy of action for breach of warranty on the conditional sale of an article does not constitute an election of remedies precluding the buyer from pursuing a proper remedy for damages for fraud.

Appeal from a judgment of the superior court for Yakima county, Nicholson, J., entered May 21, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for fraud. Affirmed.

Frank J. Allen, for appellant.

Grady, Shumate & Velikanje, for respondent.

TOLMAN, J.—Respondent, as plaintiff below, brought this action, alleging in his complaint, among other things, that in July, 1919, he purchased from appellant a certain truck, which was represented to be mechanically sound, in good condition, of two tons capacity, and capable of hauling a two-ton load over any

¹Reported in 203 Pac. 372.

of the roads in Yakima county; that he had no knowledge of or experience with trucks, which fact he made known to appellant, and in making the purchase relied wholly upon the representations made by the seller; that he turned in as a first payment an Overland touring car of an agreed value of \$500, and it appears that the balance of the purchase price, \$400, was to have been paid in installments, as specified in a conditional sale agreement executed by the parties at the time.

Respondent further alleges, with considerable detail, his experience in trying to use the truck, the defects therein which he found to exist, including an allegation that it was a one-ton truck only and that it was impossible to use the truck for his purposes, which were known to appellant at the time of the purchase; that, although demand was made therefor, appellant refused and neglected to make repairs and alterations or in any manner put the truck in a workable condition, and further, that appellant, on March 10, 1920, took possession of the truck, cancelled the conditional sale agreement, and retains the truck under claim of absolute ownership. The complaint specifies that respondent has been damaged in the sum of \$1,800 by reason of the inability to do the work contemplated to be done with the truck at the time of the purchase, in the further sum of \$500, the value of the Overland car turned in on account of the purchase price, and the additional sum of \$500 by reason of the truck being worthless for any purpose.

Appellant answered, making the usual denials, and setting up several affirmative defenses, which, so far as they are now material, may be grasped from the discussion which follows. The cause was tried to a jury, which rendered a verdict in respondent's favor

Jan. 1922]

Opinion Per TOLMAN, J.

for \$500, and from a judgment on the verdict, this appeal is prosecuted.

Appellant has made no formal assignments of error, but as we gather from the brief and oral arguments what appears to be its contention, we will mention each point raised and discuss it so far as seems necessary.

(1) That the action is for a breach of warranty which cannot be maintained, as title never vested in the purchaser; or, if the action be for fraud and deceit, knowledge of the falsity of the representations made and intent to deceive must be proved. We are of the opinion that the action is not based upon a warranty, express or implied, but solely upon the alleged false and fraudulent representations inducing the sale. An examination of the record fully convinces us that there was sufficient evidence from which the jury could draw the conclusion of knowledge and intent upon the part of the vendor, if that be necessary.

(2) Next, that since it is admitted that the subject of the sale was a second-hand car, rebuilt, with truck attachment, the rule of *caveat emptor* applies. While it may be admitted that there is ordinarily no implied warranty in the sale of a second-hand article, we know of no rule which exempts one who makes false and fraudulent representations to induce such sale, simply because the article sold is second-hand.

(3) It is contended that respondent failed to make a sufficient tender of the truck before bringing this action. There is evidence to show that respondent complained of the condition of the truck promptly as soon as he began to use it, and that promises were made to repair or alter it so that it would do the work contemplated; that these negotiations continued for several months and until appellant undertook to have the sheriff seize and sell the truck without process. Thereupon respondent brought an action based upon

the theory of a breach of warranty to recover damages, and to enjoin the sheriff from seizing or selling the truck. Becoming convinced, upon investigation of the law, that he could not maintain an action based upon a warranty where there was no completed sale, respondent notified appellant that it might take the truck, dismissed the action without prejudice (though in the order of dismissal it is recited: "it is further adjudged that the restraining order herein be dissolved and the defendant be and is hereby adjudged to be the owner of said car or truck described in defendant's affirmative defense; and the plaintiff be and is hereby ordered to release and turn over said truck to the defendant, or its agents"), and appellant took the truck, and has ever since treated it as its absolute property.

Whether, under the circumstances of this case, respondent acted promptly and effectively in attempting to rescind the sale; whether appellant repossessed itself of the truck as accepting the proffered rescission, or was justified in retaking on the ground that respondent's rights under the terms of the agreement were forfeited by failure to meet the deferred payments, were questions upon which reasonable minds might differ under the evidence in this case, and since appellant does not complain of, or bring here for review, the instructions given or refused, we must assume that these and all other questions in the case were properly submitted, under correct instructions, to the jury for its determination.

It is argued in this connection that, by bringing the prior action on the warranty, an election of remedies was made and respondent could not afterwards rescind. In *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656, it is said:

Jan. 1922]

Syllabus.

“There could be no election of remedies on the part of respondent, because he was not in possession and had never had title to the land, and could only bring an action for damages for whatever misrepresentations had been made—”.

And in *Roy v. Vaughan*, 100 Wash. 345, 170 Pac. 1019, it is clearly and squarely held that a mistake in remedy can never be construed as an election of remedies.

(4) Lastly, it is argued that the evidence was insufficient to take the question of fraudulent representations to the jury. We find, however, that this case is within the well established rules and we cannot interfere.

The judgment is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16816. Department Two. January 6, 1922.]

THE STATE OF WASHINGTON, *on the Relation of A. M. Cation et al., Plaintiff*, v. THE SUPERIOR COURT FOR WALLA WALLA COUNTY *et al., Respondents.*¹

EMINENT DOMAIN (116)—PROCEEDINGS—NOTICE—PROOF OF SERVICE—AFFIDAVITS—SUFFICIENCY. Rem. Code, § 5633, providing notice of proceedings to condemn land to be posted, in case of absentee owners, “at a conspicuous place on the lands,” is shown to be strictly complied with by an affidavit of posting “at a conspicuous place on the lands to be affected by said road.”

EVIDENCE (142) — PAROL EVIDENCE TO VARY WRITINGS — PUBLIC RECORDS. In condemnation proceedings to establish a public highway, where there are in evidence two purported orders of the county commissioners for the establishment of the road, oral evidence is admissible to show that one of them had not been adopted

¹Reported in 203 Pac. 375.

by the board nor recorded in their minutes, and that the other order had been approved and signed by the commissioners and set out in the journal of their proceedings.

Certiorari to review a judgment of the superior court for Walla Walla county, Mills, J., entered September 22, 1921, adjudging a public use and necessity in condemnation proceedings. Affirmed.

Evans & Watson, for relators.

John C. Hurspool, for respondents.

MAIN, J.—The proceedings here under review occurred in an action brought by Walla Walla county against a number of parties for the purpose of condemning certain lands for a public highway, pursuant to Remington's Code, § 5623 *et seq.* (P. C. § 5993 *et seq.*)

The complaint alleged in detail the proceedings before the board of county commissioners, and particularly alleged that the notice of the hearing on the report of the engineer upon certain of the parties was by posting a copy thereof as required by law. The allegations were denied by answer. Upon a hearing for the purpose of adjudicating a public use and necessity, there was introduced in evidence all the files of the county auditor's office pertaining to the road, and these were marked as exhibits; one of them, designated as exhibit No. 5, purports to be an order establishing the road. Later, during the trial, exhibit No. 10 was introduced, which was an order of establishment. In exhibit No. 5, one of the calls in the description of the road read "south", when it should have read "north". The correct description appeared in exhibit No. 10. The evidence showed that exhibit No. 5 had not been adopted or approved by the board of county commis-

Jan. 1922]

Opinion Per MAIN, J.

sioners, was not signed by them, and was not recorded in their minutes. The evidence further showed that exhibit No. 10, which contained the correct description, had been signed and approved by the commissioners and was set out in the journal of their proceedings. The cause was brought here by relators for the purpose of reviewing the order of the trial court adjudging a public use and necessity and which sustained the proceedings before the board of county commissioners as having been conducted in accordance with the statute.

Two questions are presented: First, it is claimed that the affidavit of one C. M. Meiners for the purpose of showing service on the nonresident relators was not sufficient, in that it failed to recite that a copy of the notice had been posted upon the lands "to be taken" for the road. The affidavit recites, among other things, that a notice was served by posting one copy at a conspicuous place at the court house in Walla Walla county and "by posting one copy thereof at a conspicuous place on the lands of said Frances T. Garrecht to be affected by said road." The statute, Rem. Code, § 5633, provides that, when the owners are absent from the county and cannot be served personally therein, "such notice shall be given, as to them, by posting written notice of the time and purpose of such hearing, one at a conspicuous place on the land or left at the residence of the owner, lessee or incumbrancer, as the case may be, and one at a conspicuous place at the court house of the county, at least twenty days before the time set for such hearing." The point is that the affidavit is defective in that it fails to state that the notice was posted upon the land "to be taken" for the road. The statute says at a conspicuous place on the land; it does not say either on the land to be taken for the road or land to be affected by the road. Accepting the rule

to be that a statute substituting other than a personal service of process is to be strictly complied with in order to confer jurisdiction, it seems to us that the affidavit in this case is a compliance with the statute. It would be very technical to hold that the affidavit in question was not sufficient.

The other point is that exhibit No. 10 should not have been introduced to overcome exhibit No. 5. The argument upon this question is based upon the assumption that exhibit No. 5, taken from the files in the auditor's office, was the original record and could not be impeached. Under the evidence, exhibit No. 10 was the original, it having been signed by the board of county commissioners and made a part of the minutes of their proceedings. It is said, however, that evidence should not have been permitted which would destroy the effect of exhibit No. 5. Exhibit No. 5 not having been signed or recorded in the minutes of the board, there was no reason why these facts could not be shown by oral testimony.

The judgment will be affirmed.

FULLERTON, MACKINTOSH, HOLCOMB, and HOVEY, JJ.,
concur.

Jan. 1922]

Opinion Per BRIDGES, J.

[No. 16672. Department One. January 7, 1922.]

MOLLIE J. VAUT, *Respondent*, v. EMEY D. VAUT *et al.*,
Appellants.¹

GIFTS (8)—EVIDENCE—WEIGHT AND SUFFICIENCY. An oral gift of a life estate in land by a son to his parents is not established by evidence showing that he purchased, and put them in possession of, the land with the idea of furnishing them a home, where there is no satisfactory evidence that it was the son's intention to grant them the exclusive possession during their natural lives.

FRAUDS, STATUTE OF (59) — EVIDENCE — SUFFICIENCY. While an oral gift or agreement concerning an interest in real estate may be proved under certain circumstances, the agreement must be established by clear, convincing, unequivocal and definite testimony.

Appeal from a judgment of the superior court for King county, Brinker, J., entered March 7, 1921, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Reversed.

Gates & Helsell, for appellants.

Byers & Byers, for respondent.

BRIDGES, J.—By this action the plaintiff sought a decree of the court establishing in her the free, sole and undisturbed use and occupation, during her natural life, of a certain five-acre tract of land located in King county, Washington, and further sought to enjoin the defendants from trespassing upon, or in any wise interfering with or using, the land. After trial, the court made its findings and conclusions in favor of the plaintiff, and its judgment based thereon decreed that the plaintiff "have the free, sole and undisturbed use and occupancy of tract No. 4 of Kent Five-Acre Tracts, in King county, Washington, during the period of her natural life," and that "the defendants and each of

¹Reported in 203 Pac. 377.

them be, and they are hereby restrained and enjoined from trespassing upon or in any wise interfering with said property during the term of the natural life of the plaintiff." From this judgment, the defendants have appealed.

The important facts are as follows: The respondent is the mother of the appellant Emery D. Vaut. In 1902, she and her husband were living on rented land near Seattle and were approaching old age, with very little money or property. The appellant Emery D. Vaut was unmarried and was either living in Alaska or intending shortly to go there to live. He purchased the tract of land in question for \$1,250, paying down a small sum and agreeing to pay the balance in twelve monthly payments. Within a few weeks after making the contract of purchase he married his coappellant, and all of the balance of the purchase price was paid out of community money. After the purchase of the property, the respondent and her husband moved onto the land and continued to reside there until the death of the husband in 1918, since which time she has continued to reside there. The appellants lived in Alaska from 1902 until 1918. In 1918 they removed to the state of Washington, and have since lived with the respondent on the five-acre tract.

Whatever rights respondent has in the land rest entirely in an oral gift or agreement. She testified as follows: "We were to have it (the land) as our own as long as we lived and improved it. . . . Emery D. Vaut told me that—well, we were living at our daughter's at the time and my son he proposed that he buy this place for us, as we had no other place, only as we would rent and secure it in some other way. He proposed that we go on this place. He was buying it on the installment plan, and that we could improve it and it would be our home as long as we lived." The

Jan. 1922]

Opinion Per BRIDGES, J.

son testified that he bought the place in part as an investment and as a home to which he might return from Alaska, and in part as a home for his parents; that he told them to go and live on the land. He denies that he gave them a life estate or any right to exclusive possession. He says that his sole idea was to furnish them a home. It is agreed by all parties that the respondent and her husband were to make only such improvements as they saw fit; they were under no obligation to make any definite amount or kind of improvements. They also agree that nothing was said about payment of taxes, and it was understood that the respondent and her husband were to have the land free of any rent. The respondent and her husband made some improvements during the 18 or 19 years they occupied the place; they enlarged the house, built a barn, did some clearing, dug a well and fixed up and improved the fences. When the parents moved on the premises most of the land had been cleared and had been in cultivation. The land, for the most part, was fertile, and furnished the respondent and her husband most of their living during all of the years they resided there. The total value of the improvements made by respondent and her husband was considerably less than the total rental value of the land during the period they occupied it. The respondent and her husband paid the taxes for something more than one-half of the years they lived on the place, and appellants paid the remainder of the taxes. After the death of respondent's husband in 1918, she wrote her son, who was still in Alaska, that she was unable to take care of the land and asked him to come and look after it. It was in compliance with this request that the appellants moved from Alaska to this land. The respondent is now about seventy-four years of age. She continues

to reside on the five-acre tract, but apparently domestic matters are not going smoothly, or, at least, to the satisfaction of the respondent. The appellants testified that they are perfectly willing that the respondent continue to live on the land during the remainder of her days.

It is our opinion that the judgment must be reversed. The respondent's testimony wholly fails to show that she and her husband were to have the exclusive possession of the land during their natural lives. Under her testimony, the most they were to have was a home on this land as long as they lived. This would not prohibit the appellants from also making their home on the same land. The judgment gives to the respondent the sole and exclusive possession of the land and drives the appellants therefrom.

But there is another reason why the judgment cannot be affirmed. The oral agreement sued upon is primarily in violation of the statute of frauds. While an oral gift of, or agreement concerning an interest in, real estate may be proved under certain circumstances, the courts universally hold that such agreement must be established by clear, convincing, unequivocal and definite testimony. *Sturgis v. McElroy*, 113 Wash. 192, 193 Pac. 719, and cases there cited. The testimony in this case falls far short of complying with that rule. The respondent was the only witness whose testimony tended to establish the original gift or contract. It is true, her daughter also testified, but her testimony is so very general in character as to be wholly without value in this regard. So that we have here the testimony of the aged mother to the effect that her son gave her the use of the property during her natural life, and the testimony of the son denying such contract.

Jan. 1922]

Opinion Per BRIDGES, J.

There is nothing in the record to show that more credence should be given to the testimony of the mother than to that of the son. If equal credence be given to each, the one would outbalance the other, and without the assistance of surrounding facts and equitable circumstances, the respondent would not have even overcome the presumption of proof devolving upon her in the usual and ordinary case. Much less has she proved her case in the clear and convincing manner required by law. The rule of proof is one not of words but of substance and must always be kept in mind. Nor are there any equitable circumstances surrounding the case which, in our opinion, would materially substantiate the testimony of the respondent. It is true she and her husband made some improvements on the land, but, as we have seen, their value was less than the rental value for the period they were in possession. Besides, such improvements as they put on the land were made voluntarily and not in compliance with any contract or agreement as to the character or amount thereof. We cannot find any equities in favor of the respondent which, in good conscience, would require us to give her the relief she asks. She has received as much or more than she has given. Possession by her, improvements made by her, and the general conduct of the parties, are as consistent with appellants' version of the matter as with that of the respondent. After all, it comes down to this, that we are not satisfied respondent was to have the rights which she seeks to establish.

It is very sincerely to be hoped that the parties to this action may compose their differences and abide together in harmony on the land, and that the respondent be permitted to spend there the remainder of her days, but no amount of sympathy which we

might have for her would justify us in a clear violation of fundamental rules of law. The judgment is reversed and the case ordered dismissed.

PARKER, C. J., FULLEBTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16703. Department One. January 7, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. J. E. CROTHERS, *Appellant*.¹

STATUTES (63)—CONSTRUCTION—TITLE AND HEADINGS. While the title to an act is always a subject for consideration in ascertaining the legislative intent, a headnote, even though enacted by the legislature as a part of the act, should not be made an excuse for construing an act which is clear, plain, and concise, leaving nothing open to construction.

SAME (63)—CONSTRUCTION—TITLE AND HEADINGS—SCOPE AND SUBJECT-MATTER OF ACT—INTENT OF LEGISLATURE. Rem. Code, § 2527, as amended by Laws 1915, p. 492, § 2, providing that "every person, who . . . being the driver of any animal or vehicle upon any public highway, street, or other public place, shall be intoxicated while engaged in the discharge of any such duties, shall be guilty of a gross misdemeanor," includes the driver of an automobile, whether he be owner or employee, the enactment of the headnote "Intoxication of employees," as an index of the section not being a limitation on the plain provisions of the statute showing a legislative intent to cover other classes as well as employees.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered January 28, 1921, upon a trial and conviction of operating an automobile while intoxicated. Affirmed.

Crollard & Steiner, for appellant.

Sam R. Sumner and *Frank Lebeck*, for respondent.

¹Reported in 203 Pac. 74.

Jan. 1922]

Opinion Per TOLMAN, J.

TOLMAN, J.—Appellant demurred to an information charging:

“That the said J. E. Crothers, in the county of Chelan, state of Washington, on the 19th day of October, 1920, did, then and there being, unlawfully and feloniously drive and operate a vehicle, to-wit, an automobile, over and upon a public highway in said county and state aforesaid, known and designated as the sunset highway; he, the said J. E. Crothers, being then and there intoxicated, and being then and there engaged in the discharge of his duty as such driver, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington.”

The demurrer was overruled by the court below. Appellant, electing to stand on the demurrer, refused to plead further and was adjudged guilty as charged, and a jail sentence and fine were imposed, from which he has appealed.

The sufficiency of the information is the only question presented, it being contended that the headnote to § 2527, Rem. & Bal. Code, as amended by ch. 165, § 2, Laws of 1915, p. 492 (Rem. Code, § 2527), having been by the legislature enacted as a part of the original act, and also as a part of the amending act, should be read in connection with the body of the act, and when so read, the act as a whole should be held to apply only to those persons who were employees at the time the offense was committed.

The amended act reads as follows:

“Section 2527. *Intoxication of Employees.* Every person who, being employed upon any railway, as engineer, motorman, gripman, conductor, switch tender, fireman, bridge tender, flagman or signalman, or having charge of stations, starting, regulating or running trains upon a railway, or being employed as captain, engineer or other officer of a vessel propelled by steam, or being the driver of any animal or vehicle upon any

public highway, street, or other public place, shall be intoxicated while engaged in the discharge of any such duties, shall be guilty of a gross misdemeanor.”

A most learned and interesting argument is presented, and many cases are cited and analyzed by appellant's counsel, but, in our judgment, no good purpose will now be served by an exhaustive examination of these authorities. We have heretofore adopted the rule that “the end of interpretation is to ascertain the legislative intent, and in the ascertainment of it the title which has been given to an enactment is always a subject for consideration.” *State ex rel. Swan v. Taylor*, 21 Wash. 672, 59 Pac. 489; *State v. Pacific American Fisheries*, 73 Wash. 37, 131 Pac. 452. So, too, a headnote intended by the legislature as a title or an index to the particular section to which it appertains must be given, at least, as much force as the title of the entire act.

But when the body of the act is clear, plain and concise, leaving nothing open to construction, we cannot hold that a headnote, even though enacted by the legislature as a part of the act, should be permitted to cast doubt upon that which is not doubtful, and be made an excuse for construing that which, without it, would require no construction. Nor do we read any of the authorities cited as going to that length. If any do so hold, we decline to follow them.

As we read the body of the act in question, it uses the term “employed” in the sense of being engaged in the occupation or enterprise referred to, and not at all in the sense that the person so engaged is employed by another for wages or for hire. For instance, one “being employed as captain, engineer or other officer of a vessel propelled by steam,” might be a part or sole owner of the vessel, receiving the profits, in whole or in part, of the enterprise instead of wages for his services,

Jan. 1922]

Opinion Per TOLMAN, J.

and yet be amenable to the law; so, also, one driving an animal or vehicle is employed, in the statutory use of that term, in that enterprise, though he may own the animal or vehicle driven, and receive nothing therefor but the pleasure emanating from doing the act.

But, in any event, there is no provision in our constitution requiring the use of headnotes, or limiting the section following to the subject-matter of the headnote; and though the legislature may have used the headnote in this instance as an index, and used the term "employed" in a sense other than as we have interpreted it, still, there is no rule of law which will confine the subject-matter of the section to employees only. The purpose of the section is to prevent one operating an instrumentality which may be dangerous to the public, if operated negligently, from so operating it while intoxicated, and the legislature, having indexed the section as relating to employees, might properly in the same section, after covering all employees, without violating any constitutional provision, cover also those persons operating like instrumentalities who were not, strictly speaking, operating as employees. The purpose of the statute is so plain and the words used are so clear and concise that, whichever way construed, the legislative intent is apparent therefrom without resort to further construction. We, therefore, cannot construe the headnote as creating a doubt where none otherwise exists.

The judgment appealed from is affirmed.

PARKER, C. J., BRIDGES, FULLERTON, and MITCHELL, JJ., concur.

[No. 16706. Department Two. January 7, 1922.]

F. H. McDERMONT, *Respondent*, v. C. C. BATEMAN *et al.*,
Appellants.¹

ATTORNEY AND CLIENT (44)—ACTION FOR COMPENSATION—EVIDENCE. In an action by an attorney to recover the reasonable value of legal services, which defendant claimed were to be rendered for a contingent fee, but the attorney testified otherwise, the questions of the rendition of the services and the reasonableness of the fee were for the jury.

WITNESSES (52) — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT. The rule against the admissibility in evidence of privileged communications between attorney and client does not extend to conversations between an attorney and his client respecting the compensation for services of an associate counsel.

APPEAL (460)—HARMLESS ERROR—INSTRUCTIONS. An ambiguous statement in the course of oral instructions given by the court cannot be deemed prejudicial where in another part of the instructions the subject-matter to which exception is taken was clearly explained to the jury.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered February 14, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Davis & Heil, for appellants.

Freece & Pettijohn, for respondent.

HOVEY, J.—This is an action by the respondent, who is an attorney at law, for the recovery of the sum of \$1,676.85, claimed to be due him for services performed for the defendants. The case was tried before a jury and a verdict rendered for \$1,200, upon which judgment was subsequently entered.

¹Reported in 203 Pac. 66.

Jan. 1922]

Opinion Per HOVER, J.

The assignments of error can be considered under three heads:

(1) Appellants contend that the fourth cause of action was improperly submitted to the jury. This involved the sum of \$50 and was claimed to be the reasonable value of the services of the respondent for appearing in court and securing the dismissal of two actions, one of them being where the appellants were plaintiffs and the other where the appellants were defendants, both with the same party. Appellants contend respondent was to undertake this service for a contingent fee, and there seems to have been some proposition made by them to that effect to start with, but the evidence of the respondent is to the effect that he found that there was nothing in the contention of appellants and that he advised them that the wisest thing to do was to dismiss their case if he could secure a dismissal of the other one, and it is not disputed that he did make the appearance and secure the dismissal of the actions. The jury had a right to believe the testimony of the respondent, both as to the service and the reasonableness of the fee.

(2) Appellants contend that evidence was improperly received consisting of the testimony of Fred B. Morrill, who was also an attorney for the appellants, relative to the terms of the employment of the respondent. The facts material to this point are these: The appellants had some important litigation with H. N. Martin, who had formerly been their attorney, and they went to respondent to secure his services. The respondent contends that he advised them to employ Mr. Morrill to assist in the matter, and the appellants contend that respondent refused to accept the employment. It is undisputed, however, that appellants went from the town of Davenport, where they resided,

to the city of Spokane and there sought the services of Mr. Morrill. The testimony of Mr. Morrill is that he demanded a fee of \$1,000 for trying the Martin cases, and that appellants objected to paying that sum because they would also have to pay the respondent for his assistance in the same cases; that thereupon he reduced his fee to the sum of \$500. It is not disputed but what the respondent participated in the trial of the Martin cases. The appellants were questioned upon cross-examination relative to this transaction and denied the same, and thereafter Mr. Morrill was called as a witness and gave his testimony. Appellants objected to this testimony upon the ground that it was a privileged communication from an attorney to his clients.

In *Hartness v. Brown*, 21 Wash. 655, 59 Pac. 491, it is stated that our statute (subd. 2, § 1214, Rem. Code; P. C. § 7725): "An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment", is merely declaratory of the common law.

The rule as stated in 40 Cyc., at page 2371, is as follows:

"In order for a communication between attorney and client to be privileged it must relate to the subject-matter of the employment, and be made for the purpose of enabling the attorney to correctly understand the matter in which he is employed, and of obtaining professional advice or assistance."

The following cases are in point with the facts in this case, and in each of them a communication was held not to be privileged: *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808; *Riggs v. Denniston*, 3 Johns. Cas. 198 (N. Y.); *Hatton v. Robinson*, 14 Pick. (Mass.) 416; *Ex parte Niday*, 15 Idaho 559, 98 Pac. 845.

Jan. 1922]

Opinion Per HOVEY, J.

In *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393, an attorney testified to instructions received by his client authorizing him to settle a judgment for less than the amount due, and this was held not to be privileged. In *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187, an attorney testified to the facts concerning his employment and was allowed to testify over the objection of his client.

This court said in *Collins v. Hoffman*, 62 Wash. 278, 113 Pac. 625, Ann. Cas. 1913A 1:

“They do not come within the rule of privileged communications given to an attorney in strict and professional confidence, in order to enable him the better to ascertain his client’s rights and to protect and maintain them. And while we confess the sound and wise policy of the law in establishing the rule of privilege as between attorney and client, it will not do to say that, because of such a relation, every act and communication between them, irrespective of its nature, is within the rule, and the relationship once being established all further inquiry must cease.”

The communication questioned had nothing to do with the advice given by Morrill relative to the conduct of the Martin cases, and it was not the statement of any fact relative to those cases. We are satisfied that it was not a privileged communication.

(3) The third error assigned relates to the instructions. These were given orally under stipulation, and in the course of them the court, in referring to the testimony of the attorneys who had been called as experts, used language to which appellants take exception, but we find that in other parts of his instructions he clearly explained to the jury what was meant in case any ambiguity can be said to exist.

We further fail to see how appellants can complain, as these experts were all called by the respondent and testified in accordance with his contention and the

error complained of, if any, appears to have been against the respondent rather than against appellants.

The judgment is affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOLCOMB, JJ.,
concur.

[No. 16802. *En Banc*. January 9, 1922.]

MABEL S. HARDEN *et al.*, *Appellants* v. STATE BANK OF
GOLDENDALE, *Respondent*.¹

EXECUTORS AND ADMINISTRATORS (45, 56)—MANAGEMENT OF ESTATE—PLEDGE OF PROPERTY—POWERS OF EXECUTOR—STATUTES. Under Rem. Code, § 1491, declaring that the property of a decedent's estate shall not be sold or mortgaged except by an order of the court, the personal representative of an estate has no authority to pledge the choses in action of the estate as collateral security without having obtained a court order therefor, and hence the pledgee can obtain no rights in such collateral.

SAME (45)—PLEDGE OF PROPERTY—LIABILITY OF PLEDGEE. Where an executor pledges to a bank to secure his personal debt a note belonging to the estate, and the bank on collecting the note applies a part of the proceeds to the individual checking account of the executor, the bank is liable to the estate for any loss suffered through the misapplication of such moneys.

APPEAL (386)—REVIEW—ESTOPPEL TO ALLEGE ERROR. The refusal of the court to give judgment on a particular claim of indebtedness involved on the trial cannot be urged as error where there was no appeal from such refusal.

Appeal by plaintiffs from a judgment of the superior court for Klickitat county, Darch, J., entered June 15, 1920, upon findings favorable to the plaintiffs, in an action to recover property belonging to an estate, tried to the court. Reversed.

Miller, Wilkinson & Miller, for appellants.

John R. McEwen, for respondent.

¹Reported in 203 Pac. 16.

Jan. 1922]

Opinion Per BRIDGES, J.

BRIDGES, J.—By this action the plaintiffs sought to recover from the defendant possession of four promissory notes, and mortgages securing the same, or, if the defendant had collected any of the notes, then judgment for the amount so collected. All of these notes were made payable to Ada S. Clark. The makers were Schurtz and wife, Forbes and wife, Peterson and wife, and Yates. At the trial it appeared that the respondent held the Schurtz and Forbes notes and mortgages, but that the Yates and Peterson notes had been collected while in its possession. The court gave judgment requiring the defendant to surrender to the plaintiffs the Schurtz and Forbes notes and mortgages, but refused to give any money judgment against it on account of the notes it had collected. The plaintiffs have appealed because the court refused to give the money judgment.

We find the prevailing and controlling facts to be as follows: On August 10, 1915, Ada S. Clark died, leaving surviving her Harold J. Clark, her husband, and two minor children. The notes and mortgages above mentioned were her separate property. She was also the owner of a community interest in certain real estate and personal property. Her will devised all of her separate property to the Security Savings and Trust Company, a corporation, of Portland, Oregon, in trust for the use and benefit of her two minor daughters, and gave all of her interest in the community property to her husband, and appointed him as executor of the will. Shortly after her death, the husband was appointed and duly qualified as executor. Thereafter he filed in the probate matter an inventory showing that the notes and mortgages above mentioned were the separate property of his deceased wife.

After his appointment and qualification as executor, Mr. Clark, on December 10, 1915, borrowed from the

respondent \$1,000 and executed and delivered to it his note as executor for that sum. He also delivered into the possession of the respondent the above mentioned notes and mortgages as security for the loan made to him. Sometime thereafter the executor gave to the respondent his additional note in the sum of \$900, and the notes and mortgages theretofore placed with respondent were also to secure this note. The court having charge of the probate proceeding did not at any time authorize the executor to execute the two notes made by him to the respondent, or to turn over to the respondent the notes and mortgages above mentioned, as collateral security. It does not appear that the estate of the decedent ever received any benefit from the moneys borrowed by Mr. Clark, but that, on the contrary, he used all such sums in his own private affairs.

Before the institution of this suit, the Peterson note was paid in full by the maker in the sum of \$587.50. It would appear that this money was paid directly to Mr. Clark, who delivered it to the respondent, and the latter then surrendered the note so paid either to Mr. Clark or to the maker thereof, and the amount so paid was credited upon the notes given by the executor. It further appears that, before the suit was instituted, Mr. Yates, maker of one of the other notes, paid the same to Mr. Clark in the sum of \$859. Thereupon Mr. Clark took the money to the respondent and the bank then surrendered the paid note either to Mr. Clark or to the maker, and at Mr. Clark's request credited \$500 of the money so paid on the notes given by him as executor, and placed to his individual account the balance of the amount so paid, to wit, \$359. Some months after these detailed transactions, Mr. Clark died and Mabel S. Harden and Regina Curl were appointed administratrices of the estate of Ada S. Clark, deceased, and they instituted this action.

Jan. 1922]

Opinion Per BRIDGES, J.

The estate of Ada S. Clark, deceased, did not obtain any of the moneys collected from the Yates and Peterson notes.

The appellants argue that the respondent is liable for the amounts collected by it on the Yates and Peterson notes, because the court did not authorize the giving of the notes by the executor or the putting up of the estate's notes and mortgages as collateral security. The respondent argues that the title to the notes and mortgages put up as collateral security vested absolutely in the executor, with power to sell or pledge them without any order of the court, and that one taking choses in action as a pledge from an executor takes them as freely as they could from the owner.

The probate code, as it existed prior to the enactment of the 1917 probate code (Laws of 1917, p. 642), is controlling here because the transactions under consideration occurred prior to the passage and going into effect of the 1917 code. Section 1491, Rem. Code, provides that:

“No sale or mortgage of any property shall be valid unless made under order of the court, unless otherwise provided by law.”

The respondent contends that this statute does not cover and include choses in action, and that it was not necessary for the executor to obtain the order of the court to place these collateral securities with the respondent. We cannot agree with this contention. In this state an executor or administrator acts only and always in a representative capacity. He has no powers except such as are given by statute. His acts are always under the direction of the court. The statute quoted expressly and plainly says that no property of an estate shall be sold or mortgaged without the order of the court. We cannot see any good reason

for holding that a chose in action should be excepted from its provisions. The reasons which require the executor to obtain the permission of the court to sell or mortgage the ordinary personal property of the estate applies with equal force to choses in action. A promissory note or other chose in action is as much "property" within the meaning of the statute as any other class of personal property. Not only does § 1491 require us to so hold, but the spirit of the whole probate code points unerringly to the same conclusion.

At the common law, executors and administrators took the title to all personal property of the estate, and might sell or mortgage it without order of the court. It is well known that they often took advantage of their powers to the great detriment of the estates they represented. These abuses were as much in the handling of choses in action as any other kind of personal property. By § 1491 the legislature of this state sought to put an end to such practices. It would seem to be an exceedingly narrow construction of the code to hold that the legislature intended to correct the evils as to ordinary personal property but leave choses in action, which usually constitute a large portion of the assets of estates, subject to the very wrongs it was seeking to correct. We construe the statute to mean exactly what it says. Consequently, it must follow that the executor here had no authority to put up as collateral security the notes and mortgages held by him as executor without having obtained the order of the court so to do, and that the respondent could not thereby obtain any rights as to the notes or the proceeds thereof. We do not mean to hold that the court must, in the first place, make its order authorizing the sale or mortgage. If an executor mortgage or sell personal property without first obtaining the order

Jan. 1922]

Opinion Per BRIDGES, J.

of the court, and the estate derives benefit therefrom, and the court afterwards approve the executor's acts, it may be that the proceeding is legal. But such is not the situation here, and we are not called upon to decide that question.

It must be conceded that there are a number of excellent cases and authorities which seem to support the respondent's contention. Some of these are: 11 Am. & Eng. Ency. Law (2d ed.), 1010; *Weider v. Osborn*, 20 Ore. 307, 25 Pac. 715; *Smith v. Ayer*, 101 U. S. 320. In the case of *Weider v. Osborn*, *supra*, the Oregon supreme court elaborately discusses the question and cites most of the authorities in support of its view. Some of the cases holding to the contrary view are: *Winningham v. Holloway*, 51 Ark. 385, 11 S. W. 579; *Pierce v. Batten*, 3 Kan. App. 396, 42 Pac. 924; *Smith v. Griffin*, 32 Ga. 81; *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. 118; 18 Cyc. 358-359. We prefer to follow the rule of the cases last cited, because they are in accord with the express wording and the spirit of our probate code.

Respondent, in any event, objects to judgment against it in the whole amount collected on the Yates note, because it retained only \$500 of that amount and paid the balance, to wit, \$359, to Clark, who was the executor. But the testimony shows that the respondent was possessed of such facts as required it to learn and know that Clark, as executor, gave the notes and put up the collateral security belonging to the estate solely for his own advantage, and that the estate did not, nor was it contemplated that it would, obtain any benefit whatever from the transaction. It is true respondent did not obtain the benefit of the \$359, but paid it directly to Mr. Clark. But respondent was doing a banking business and placed that sum of money

to Clark's private banking account, and knew that he was checking against such account for his own private ends. With all of this information at hand, the respondent must be held liable for the whole amount it collected from the collateral which it unlawfully held. Manifestly respondent considered that the executor had a lawful right to put up these notes as security, and that it was under no obligation to inquire as to what disposition was made of the money collected therefrom, consequently it was free from intentional wrong, but it must bear the burdens resulting from its mistaken judgment.

The appellants have asked judgment for a certain amount collected on what has been called the Dayton note. We do not consider this claim because they did not appeal from the refusal of the court to give judgment on that instrument.

The trial court is directed to enter judgment against the respondent and in favor of the appellants in the sum of \$1,446.50, together with interest from the dates of the collection by the respondent of such amount.

PARKER, C. J., MACKINTOSH, FULLERTON, MAIN, TOLMAN, MITCHELL, and HOVEY, JJ., concur.

HOLCOMB, J., concurs in the result.

Jan. 1922]

Opinion Per BRIDGES, J.

[No. 16674. Department One. January 9, 1922.]

W. SUNADA *et al.*, Respondents, v. OREGON-WASHINGTON
RAILROAD & NAVIGATION COMPANY, Appellant.¹

CORPORATIONS (266) — FOREIGN CORPORATIONS — GARNISHMENT — SERVICE OF WRIT—STATUTES. Under Rem. Code, § 687, providing that writs of garnishment shall be served in the same manner as provided for the service of summons, service upon the assistant cashier in the freight office of a foreign railroad corporation is sufficient, in view of Rem. Code, § 226, subd. 9, which provides that service of summons against a foreign corporation doing business in the state may be made upon "any agent, cashier or secretary thereof;" and the service is governed by subd. 9, rather than by subd. 4, relating to service upon "a railroad corporation," as that refers to domestic corporations.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 15, 1921, in favor of the plaintiffs, denying a motion to vacate a default judgment in garnishment proceedings. Affirmed.

Bogle, Merritt & Bogle, for appellant.

Geo. B. Cole and *John Wesley Dolby*, for respondents.

BRIDGES, J.—Appellant was a garnishee defendant in the lower court. It failed to appear and judgment against it was taken. It then appeared specially and moved to vacate and set aside the judgment because of the insufficiency of the service on it. Its motion was denied, and the only question before us is the legal sufficiency of the service of the writ of garnishment.

The sheriff's return shows that service was made on "E. F. Upham, the asst. cashier freight dept." of the appellant at Seattle. Mr. Upham, in an affidavit in support of the motion to vacate, states that, at the

¹Reported in 203 Pac. 64.

time of the service of the writ on him, one Wamsley was the local freight agent for appellant, and one Johnson was the cashier in that office, and that he (Upham) was the assistant cashier, and that the duties of the cashier and his assistant were, among other things, the handling of the pay rolls of the various depots, yards and section employees of the appellant; that he was not a freight agent, and as assistant cashier his duties were of a clerical nature.

Section 687, Rem. Code (P. C. § 8006), provides that writs of garnishment shall be served in the same manner provided for the service of a summons. Section 226, Rem. Code (P. C. §§ 8438, 8439), is with reference to the service of summons and has thirteen subdivisions. The first subdivision concerns counties, the second cities, the third school districts, and the fourth reads as follows: "If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state"; subdivision 5 is with reference to corporations owning or operating sleeping cars, the sixth refers to insurance companies, the seventh to express companies, the eighth affects all corporations other than those previously mentioned. The ninth reads as follows: "If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof." The remainder of the subdivisions are with reference to service on individuals, minors, guardians, etc.

Appellant contends that the service must be made as provided in subd. 4, *supra*, whereas respondent contends that subd. 9, *supra*, is controlling.

The record shows that the appellant is a foreign corporation, and we are satisfied that subd. 9 controls as to the manner of service. All of the subdivisions

Jan. 1922]

Opinion Per BRIDGES, J.

preceding 9 are with reference to counties, cities, and school districts within the state, and domestic corporations. The question then is, was Upham "any agent, cashier or secretary," as provided in subd. 9.

The statute does not require the service to be made upon any particular agent. Of course, the person upon whom service is made must be to some extent a representative of the corporation. Doubtless, it would not be sufficient to make the service upon a common laborer employed by the corporation, nor upon one who did not in any regard represent it. But the record here shows that the person upon whom service was made was, at least in some degree, representative of the corporation, for he was its assistant cashier in its freight office. It was his duty to handle various pay rolls, and in so doing he represented the corporation.

In the case of *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161, we said the statute—

" 'Makes service on "any agent" of a foreign corporation sufficient. The statute, therefore, does not require that the agent shall be general, but is complied with by a service upon an agent having limited authority to represent his principal'."

See, also, *Sievers v. Dalles, Portland & Astoria Nav. Co.*, 24 Wash. 302, 64 Pac. 539. But the statute goes further and provides that the service may be made on any cashier, and here it is admitted that Upham was an assistant cashier.

We conclude that the service was properly made and that the judgment must be affirmed. It is so ordered.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16630. Department Two. January 9, 1922.]

THETFORD PICKARD, *Appellant*, v. JOHN E. WEBB *et al.*,
Respondents.¹

GUARDIAN AND WARD (20)—ACCOUNTING—ORDER OF COURT—NECESSITY. A settlement between a guardian and ward after the latter attains his majority, made without an order of court, amounts to a legal discharge of the guardian, when made without fraud or abuse of the guardian's position of influence over the ward.

SAME (24) — ACCOUNTING—FRAUD—EVIDENCE—SUFFICIENCY. The burden of showing perfect good faith incumbent on a guardian in dealing with a ward is sustained by evidence showing a full, fair and complete understanding of the ward at the time of a settlement between them after the ward had attained his majority.

SAME (24). Where a ward, at the time of an accounting and settlement between him and his guardian, has knowledge of facts sufficient to put him on inquiry as to his rights, his delay of eight years in commencing suit to set aside the settlement constitutes such laches as to give him no standing in a court of equity.

Appeal from a judgment of the superior court for Walla Walla county, Blake, J., entered February 19, 1920, in favor of the defendants, dismissing an action for equitable relief, tried to the court. Affirmed.

Richards & Richards and *George H. Bishop*, for appellant.

Sharpstein, Smith & Sharpstein, for respondents.

MACKINTOSH, J.—The appellant is the son of the respondent Anna Webb. His father died in 1902, and she was appointed administratrix of his estate, which was closed in 1904, at which time she was appointed guardian of the appellant's estate, he then being a minor of the age of fourteen years. The mother married the respondent John E. Webb, and together they managed the estate of the ward. In 1911, a few days after the

¹Reported in 203 Pac. 51.

Jan. 1922]

Opinion Per MACKINTOSH, J.

appellant became of age, his mother procured a release from him of all his interest in the guardianship estate, and took from him a warranty deed therefor. The guardianship estate has never been closed by the court. When the appellant was nineteen years of age he married. The respondents at that time gave him a home and the surrounding lands, which was taken as an advancement on his interest in the guardianship estate.

The accounts filed in the guardianship estate were very irregular, the last one prior to 1913 being for the year 1909. In 1919, a sister of the appellant began suit against her mother, as her guardian, requiring an accounting and settlement of the estate. In that action the respondents were required to file an accounting, which was introduced in evidence, and it was upon the trial of that case that the appellant here alleges he first discovered that the respondents claimed to have settled with him in full, and that they had concealed and secreted a part of the assets of the estate.

The trial court found against the appellant, who is seeking to have the warranty deed made by him to the respondent cancelled, and to have the guardianship estate settled.

It is the contention of the appellant that a guardian must file his final account and pay over the money and goods in his possession upon order of the court, and not otherwise. But, as we view it, a guardian, after the ward has arrived at maturity, may make a settlement of the estate without procuring an order of the court, so long as that settlement is made without fraud or abuse of the guardian's position of influence over the ward, which will amount to a legal discharge of the guardian without the court's order. *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765. It, therefore, becomes

necessary to discover whether the settlement between the appellant and his mother is free from fraud.

The rule which we have heretofore announced in *Hemrich v. Hemrich*, 117 Wash. 124, 201 Pac. 10, is applicable to this case. The burden is upon the guardian to show the degree of good faith that was there laid down as being necessary in dealings between persons sustaining to each other the fiduciary relationship that here existed. Many details are alleged and sought to be proved by the appellant in connection with the management of this estate which, according to his contention, support his accusation of fraudulent conduct. It was claimed that a lease to state school lands which belonged to the estate had been concealed from him, as also had a lease from the Northern Pacific Railway Company; also, that he was unaware of the existence of a warehouse upon the property; that the accounts had been surcharged in the amount of \$1,120, and that the accounts for the years 1908 and 1909 contained discrepancies; that the plow land had been surcharged; that crops raised on the estate had not been accounted for; that there were certain lands owned by the estate which had never been disclosed; that certain lands had been cropped and never reported; and that there was money due the estate outstanding which had never been accounted for.

It is his contention that all these things were unknown to him until they were disclosed pending the litigation between his sister and mother. All of these facts depend upon disputed evidence, and although we recognize the burden was upon the guardian to show that she had fully complied with the rigid rules of law exacting from her perfect good faith in dealing with her ward, we cannot help but be impressed, as was the trial court, with the fact that the evidence in this case meets the law's requirements, and that it is

Jan. 1922]

Opinion Per MACKINTOSH, J.

impossible to say that a full, fair and complete understanding was not had by the appellant at the time he made the settlement with his guardian. We have not here the case of a boy who was entirely inexperienced, and who was not familiar with the entire situation surrounding the property. At nineteen he was married and set up an estate of his own. He had always lived upon, or very near, the property constituting the guardianship estate; he was familiar with the way it was being handled; he knew its extent, its productivity and its probable income, and we are thoroughly persuaded that, at the time of the settlement, he was not overreached. More than that, for eight years thereafter he continued satisfied with the settlement, and although the record shows that he had been unsuccessful in his own ventures, there is no suggestion or complaint from him that would indicate that he had any suspicion he had been dealt with other than fairly. Of course, he claims it was not until 1919 that he discovered what he now says are discrepancies in the accounts, and that he then first learned that he had deeded his interest in the estate away. This is really incomprehensible. As we have said, he was in a position where he could have observed what was taking place; his conveyance was a matter of record; the whole situation was before him if he had only looked, and it must be that his conduct, in face of the possibilities of discovering the delinquencies, if any there were, has been such that the courts will not at this time be open to him. Although he is not bound by the limitation of any statute, still the period of his inactivity has been so long that it must be said he has been guilty of laches.

The trial court, who painstakingly heard and passed upon this case, summarized succinctly and correctly the situation in a memorandum decision:

“The substance of these charges of fraud are:

“1st. He was induced by defendants to sign the deed and release without reading them; that he did not know the contents of them; that he did not intend to make a settlement and would not have signed the papers if he had known that he was relinquishing his interest in the estate.

“2nd. That a full disclosure was not made by the guardian as to the assets of the estate at the time plaintiff became of age.

“The alleged fraudulent representations first above referred to have not been substantiated by any credible testimony. On the contrary, it is demonstrated by the overwhelming preponderance of the evidence that he not only knew what he was signing at the time he executed the release, but that he intended to release his mother from her trust and intended to deed his interest in the estate to the defendants. It is not necessary to review the evidence in detail on this subject. It will suffice to say that plaintiff in the years intervening between 1911 and 1919 has said to different persons and on different occasions that he had no further interest in the estate, or that he had settled with his mother—and statements of like import.

“So the action must fail unless the alleged failure of the guardian to make a full disclosure of the assets of the estate and of her receipts and disbursements in the execution of her trust, render the transaction voidable. It is doubtless the law that where a guardian settles with a ward without making a full and fair disclosure of his acts as such, the settlement is voidable at the option of the ward after attaining his majority. But the right of that ward is not everlasting. He must act within a reasonable time after coming of age or else he will be held to have lost his action by reason of laches. What is a reasonable time is ordinarily the period of the statute of limitations in actions of fraud. Measured by that yard stick, the plaintiff's cause would have been barred in April, 1914.

“But plaintiff claims that he did not know until 1919 that a full disclosure had not been made by the guardian. But he cannot be heard to say so, for he is

Jan. 1922]

Opinion Per MACKINTOSH, J.

chargeable with knowledge as of the time that he was in possession of facts which would put him upon inquiry as to the fairness of the settlement. And in this case such facts existed and were within the knowledge of plaintiff in April, 1911.

“There are two such facts, much urged on the argument, of which the plaintiff must have known or, at any rate, with notice of which he is chargeable. He knew of the purchase of the ward’s interest in certain estate lands for \$30 per acre in 1911. He claims he was defrauded in this respect because he alleges the land was at that time worth \$35 per acre. Again, he claims that in 1911 his interest in the capital assets of the estate was worth \$15,000 or \$16,000, and that in fact all that he ever received from the estate was \$8,000 or \$9,000. These facts were as patent in 1911 as in 1919.

“Again he charges that certain leaseholds were not made known to him. He had the knowledge or means of knowledge at hand in 1911 with respect to these as well as in 1919. The Northern Pacific right-of-way and the school lands were farmed for many years prior and subsequent to 1911 in connection with the estate lands.

“I conclude that with the knowledge of these facts he was chargeable with such knowledge as should have put him to an inquiry as to his rights in 1911. Failing to commence his action until 1919, he is guilty of laches and has not standing in a court of equity.”

This decision meets with our acquiescence. The judgment is affirmed.

FULLETON, MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16677. Department One. January 9, 1922.]

In the Matter of the Estate of JOHN SANDERSON.

*ISABELLA RICE, as Executrix etc., Appellant, v. ALICE SANDERSON, Administratrix, Respondent.*¹

HUSBAND AND WIFE (58)—COMMUNITY PROPERTY—PROPERTY ACQUIRED DURING MARRIAGE—PRESUMPTIONS. Property acquired by spouses during the marital relation is presumptively community property, but this presumption is a rebuttable one.

SAME (19, 58, 60)—WIFE'S SEPARATE ESTATE—PURCHASE BY WIFE—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY. Where land is purchased by a wife with her separate funds, its status as her separate property remains as fixed until changed by deed, due process of law, or some form of estoppel.

Appeal from a judgment of the superior court for King county, Allen, J., entered March 15, 1921, upon findings in favor of the defendant, upon a contest to determine the right to administer an estate, tried to the court. Modified.

Thorwald Siegfried and Eimon L. Wienir, for appellant.

Will H. Merritt and Winter S. Martin, for respondent.

MITCHELL, J.—John Sanderson died April 2, 1920, in and a resident of King county, Washington. He left surviving him a widow, Alice Sanderson, to whom he had been married since December 25, 1900. He left a will in which Mrs. Isabella Rice, a daughter by a former marriage, was nominated as executrix. The will was proven and admitted to probate and Mrs. Rice qualified as executrix thereof. About the same time Mrs. Sanderson, representing that all the property

¹Reported in 203 Pac. 75.

Jan. 1922]

Opinion Per MITCHELL, J.

which the deceased owned at the time of his death was community property, was appointed administratrix of the estate. A contest arose between the two representatives as to the character of the property, under § 49 of the probate code of 1917 (Laws of 1917, p. 654), Pierce's Code, 1921, § 9935, which provides that a surviving spouse shall be entitled to administer upon the community property, notwithstanding the provisions of the will to the contrary, if the court find the spouse to be otherwise qualified.

Upon hearing the contest, the trial court made findings and conclusions and entered judgment that a portion of the property (designating and describing it) was separate property of the deceased and the residue community property. An appeal has been taken from the judgment.

At the time of his marriage, John Sanderson owned in his own separate right a tract of real property that was sold in the year 1902. All of the property he was interested in at the time of his death was acquired during his second marriage relation. Under our community property system the presumption is that property acquired during the marital relation is community property, but this presumption may be rebutted. *United States Fid. & Guar. Co. v. Lee*, 58 Wash. 16, 107 Pac. 870; *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673, and many other cases. With this well settled rule in mind, the case presents nothing other than matters of fact. Not confining ourselves to the arguments and abstracts of the respective parties, the statement of facts in the case has been fully examined, and, with one exception, we reach the conclusion expressed by the trial court upon the written findings of fact entered in the cause. The one exception referred to is this: The trial court found that the home place, lot 2, block 3, Ballard's Addition to Gilman Park, King county,

Washington, was the community property of John and Alice Sanderson, whereas the testimony shows without dispute that the lot was purchased by Mrs. Sanderson and paid for with her own separate funds. "We said in the case of *In re Deschamps' Estate*, 77 Wash. 514, 137 Pac. 1009, that the status of property is fixed at the time of its purchase, and remains so fixed unless changed by deed, by due process of law, or by the working of some form of estoppel." *Morse v. Johnson*, 88 Wash. 57, 152 Pac. 677; *Rawlings v. Heal*, 111 Wash. 218, 190 Pac. 237. None of the ways for changing the status of property, as above mentioned, exists in this case.

Remanded with directions to modify the judgment according to the views herein expressed. In all other respects the judgment is affirmed.

The administratrix will recover her costs of the appeal.

PARKER, C. J., FULLEBTON, TOLMAN, and BRIDGES, JJ., concur.

Jan. 1922]

Opinion Per TOLMAN, J.

[No. 16656. Department One. January 9, 1922.]

MARY E. BRALLIER, *Appellant*, v. CLAUDE BRALLIER
*et al., Respondents.*¹

TRUSTS (6, 47)—TRANSFER OF LEGAL TITLE—CONVEYANCE TO THIRD PERSON—ENFORCEMENT OF TRUST—EVIDENCE. Where land is conveyed by a mother to a son in consideration of past services and an agreement to assist in her future support, there is no such trust impressed on the land as will enable the mother to follow the proceeds of its sale to other land purchased by him and transferred to a third party, when there is no proof from which the court can determine how far the consideration for the deed from the mother had failed, nor any proof of facts brought to the third party's attention sufficient to constitute notice that the son was not vested with complete title.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered January 3, 1921, in favor of the defendant, in an action to impress a trust on real property, tried to the court. Affirmed.

Stephen E. Chaffee and *R. John Lichty*, for appellant.

J. C. Hauschild and *O. L. Boose*, for respondent.

TOLMAN, J.—Appellant, who was plaintiff below, is the mother of the defendant Claude Brallier, and the respondent Evelyn Brallier was the wife of Claude Brallier at the time the action was instituted, but has since been divorced.

Appellant is a widow and the mother of ten children, all living, and prior to the year 1916, she owned and resided with her younger children upon a tract of 16.7 acres of land in Yakima county, Washington. Her youngest son, Claude, had remained at home farming his mother's land, part of the time in connection with other land which he rented, and in 1915

¹Reported in 203 Pac. 381.

Claude married the respondent. Thereafter he and his wife occupied and farmed the home place, and the mother with her younger daughters, who remained with her, removed to Sunnyside. In the fall of 1915 or early in 1916, Claude asked his mother to deed him the home place in payment for his services theretofore rendered, and she demurred, saying, in effect, that she did not think he had fully earned it. The matter was talked about frequently thereafter, the mother, son and daughters all participating in the several conversations.

On July 10, 1916, the mother deeded to Claude 14.7 acres of the tract, and at the same time, as a part of the same transaction, deeded to two of her daughters the remaining two acres upon which the dwelling house was situated. The testimony, with but little conflict, seems to establish that the consideration for the conveyance to Claude was partly past services covering some four or five years after he became of age, during which time he remained at home and operated the farm, and partly future support, all substantially agreeing that both Claude and the daughters who received the two acres were to contribute towards the support of the mother and the younger children, and that Claude agreed to supply his mother with what she needed from the products of the farm, and money if necessary, or when necessary. Claude seems to have paid his mother's house rent while she lived in Sunnyside, and to have furnished more or less of what she needed or could use from the farm during the years 1916 and 1917, but all agree that he did nothing for his mother's support at any time thereafter. Claude farmed the land in 1916 and received the proceeds, he rented it in 1917 and 1918 and received the rents. Soon after the deed was delivered to him, Claude mortgaged the land for \$1,000, and with the

Jan. 1922]

Opinion Per TOLMAN, J.

borrowed money made the initial payment upon a thirty-acre tract several miles distant which he then purchased, and used the remainder of the borrowed money in improving, buying seed for, and paying interest and taxes upon, the land thus purchased, where he afterwards made his home, and perhaps, in part, for living expenses prior to the time when the new farm became productive.

In May, 1919, Claude sold the land which he had received from his mother for \$3,000, the purchaser assuming the mortgage for \$1,000 and paying the balance, \$2,000, in cash. Five hundred dollars of this money Claude used in paying obligations incurred in connection with the land which he had purchased, and \$1,500 was placed as a time deposit, on interest, in a local bank. Early in the year 1920, trouble having arisen between Claude and his wife, a property settlement was made between them, by which Claude conveyed to respondent the thirty acre tract of land, which is alleged to be worth \$7,500, subject to taxes and an incumbrance of \$900 still owing on the purchase price, and all of the personal property kept and used therewith, which personal property respondent afterwards sold for some \$1,400. Claude then departed, taking with him some \$1,400 or \$1,500, mostly what was left from the sale of the 14.7 acre tract, which had been on deposit with the local bank. Appellant thereupon brought this action, claiming a recovery for the value of the land conveyed to Claude, \$3,000, its rental value for three years during which he held title, \$837.90, and the value of certain personal property which she alleges was left on the place and Claude appropriated to his own use, \$325, or a total of \$4,162.90, which she seeks to have impressed as a lien upon the thirty-acre tract conveyed in the property settlement by Claude to respondent, upon the theory that the proceeds of the land which she

conveyed to her son went into and enabled him to purchase and improve this tract. Claude answered, admitting all of the allegations of his mother's complaint. Respondent answered, denying all of the material allegations of the complaint, pleading several affirmative defenses, and tendering into court the sum of \$1,260, which amount she alleges to be the full benefit received by her, directly or indirectly, from the conveyance made by appellant to Claude. From a judgment awarding her the amount tendered and no more, and denying costs to either party, appellant here seeks a review on appeal.

Appellant urges that the equitable title to the real estate which she conveyed remained at all times in her, while the legal title was in her son, who was a trustee for her benefit, citing and relying upon *Payette v. Ferrer*, 20 Wash. 479, 55 Pac. 629, and *Ford v. Kimble*, 41 Wash. 573, 84 Pac. 414, and therefore urges that she is entitled to invoke the well settled rule that a mere change of the trust property from one form to another will not defeat her rights, but having traced the proceeds of the property which she conveyed into the purchase and improvement of the thirty-acre tract, the trust should be impressed thereon, at least to the extent of what would otherwise be her loss, since respondent took title with notice of her rights. But we cannot find facts in the record which bring this case within the rule. As to the personal property which appellant claims she left upon the place, there is no attempt to show that she ever asserted any title thereto prior to the beginning of this action, or that there was any fact or circumstance ever brought to respondent's attention which would put her on notice that Claude was not vested with complete title thereto, nor is it con-

Jan. 1922]

Opinion Per TOLMAN, J.

tended that there was not ample consideration for its transfer, by the property settlement, to the respondent.

As to the real property, whatever effect should be given to the admitted fact that Claude did not agree to support his mother, but only to help support her, and the question as to the extent or amount of such help, it clearly appears from the evidence, and, in fact, is not denied, that the consideration in part for the transfer was past services rendered by Claude from the time he became of age to the time of his marriage, or the time of the making of the deed. In the absence of any allegation or proof as to the value of such services, or of the value or extent of the contributions to be made towards such support, which also in part formed the consideration for the deed, we cannot determine how far the consideration for the deed failed, or the amount, if any, of the loss suffered by the appellant by the failure of her son to carry out his agreement.

Since respondent has made a tender of \$1,260, we must assume, in the absence of proof to the contrary, as did the trial court, that the amount tendered is sufficient to cover the value of the support contracted to be given and wrongfully withheld.

Appellant also contends that the trial court erred in not rendering a money judgment against the defendant Claude Brallier. As we have seen, there was no proof before the trial court from which the amount of such a judgment, on any proper theory, could be determined, and moreover, the record fails to show any request by the appellant for the rendition of such a judgment.

Reprehensible as his acts have been (and he admits them to have been as charged), we see no way by which we can now direct a judgment which would place upon him the burden which he deliberately assumed and for

which he has already been compensated. The judgment appealed from is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16731. Department One. January 11, 1922.]

SOCIETY THEATRE *et al.*, Respondents, v. THE CITY OF SEATTLE *et al.*, Appellants.¹

LOTTERIES — VIOLATION OF ORDINANCE — EVIDENCE — SUFFICIENCY. The elements of a lottery consisting of a consideration, a prize, and a chance, a theatre which distributes tickets to its patrons without any extra charge which entitles the holder to a chance for merchandise prizes in a drawing, by lot, is guilty of violating an ordinance prohibiting the sale or disposition of any property by chance, since there is an indirect consideration paid and received in the fact that the prizes attract persons to the theatre who would not otherwise attend.

MUNICIPAL CORPORATIONS (329) — POWERS — PENAL ORDINANCES — VALIDITY—CONFLICT WITH STATE LAW. A city ordinance with reference to lotteries is enforceable, though it may be broader and more inclusive than state statutes upon the same general subjects.

Appeal from a judgment of the superior court for King county, French, J., entered June 4, 1921, in favor of the plaintiffs, in an action for an injunction, tried to the court. Reversed.

Walter F. Meier, George A. Meagher, and Ray Dumett, for appellants.

Eugene A. Childe, for respondents.

BRIDGES, J.—Suit to enjoin officers of the city of Seattle and of the county of King from interfering with the plaintiffs in the conduct of a certain business. From a judgment adverse to them, the officials of the city of Seattle have appealed.

¹Reported in 203 Pac. 21.

Jan. 1922]

Opinion Per BRIDGES, J.

A part of the plaintiffs were representatives of a concern known as the Northwest Products Advertising Association, and the remainder were owners and operators of motion picture theatres in Seattle. The members of the association are various merchants, manufacturers, growers and the like, located in and about the city of Seattle. The purpose of the association is to advertise the products of its members. These members furnish it small quantities of their merchandise, manufactured products, and other like articles, to be given away. Those in the active charge of the association have made arrangements with various motion picture theatres whereby they permit it to distribute to the patrons of the theatres certain free tickets with numbers on them. These tickets are distributed by the association after the patrons have been admitted to the theatre in the usual manner. Following the regular performance, the association conducts a drawing by lot, and those holding the fortunate tickets receive a prize consisting of a sack of flour, or a can of a certain brand of fish, or other like article. The theatres have nothing to do with the giving out of the tickets, the drawing, or the distribution of the prizes, and they do not make any extra charge for admission to the theatre. It will thus be observed that the theatres have no direct connection with the distribution of the tickets or the prizes, and that the persons receiving them do not pay any direct consideration for them. After a preliminary hearing, the court made an order enjoining the defendants from interfering with the plaintiffs and their business, so long as such business is conducted in the manner aforesaid, and until the final disposition of the case. This order of the court further provided that the respondents should not be permitted to "advertise said drawings as a means of increasing the patronage of said theatres."

The city officials contend that the operations conducted by the respondents are in violation of an ordinance of the city of Seattle, which reads as follows:

“Section 24. Lotteries: It shall be unlawful for any person to open, conduct, maintain or carry on, or be in any manner connected with, any lottery or any establishment or business, by whatever name it may be known, wherein any property is sold or disposed of by chance, or to sell or dispose of any lottery ticket or share, whether for religious or secular purposes, or any chance, or any article or thing entitling, or purporting to entitle the purchaser to any chance, or to sell or dispose of any package or article purporting to contain a prize, or where, as an inducement to purchase, it is held out that such article or package may contain a prize or may entitle the purchaser to some article or thing of value not directly contemplated and known in the purchase.”

The elements of a lottery are: First, a consideration, second, a prize, and third a chance. It needs no argument to show that the second and third elements appear in the business conducted by respondents. But it is argued that the element of consideration does not appear because the patrons of the theatres pay no additional consideration for entrance thereto, and pay nothing whatever for the tickets which may entitle them to prizes. But while the patrons may not pay, and the respondents may not receive, any direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theatres who would not otherwise attend. In this manner those obtaining prizes pay considerations for them, and the theatres reap a direct financial benefit. The mere fact that respondents are not permitted to advertise their drawings cannot remove the sting, because the scheme will advertise itself. But aside from this line of argument, it is perfectly plain to us that the business of

Jan. 1922]

Opinion Per BRIDGES, J.

respondents, carried on as it is, comes directly within the inhibition of the ordinance, because respondents are directly connected with a business where "property is sold or disposed of by chance." This ordinance is broad. It gives its own definition of a lottery, which is probably somewhat wider than the usual definition given by the dictionaries. The purposes of the association may be, and probably are, laudable, but the manner of carrying out those purposes is certainly prohibited by the ordinance.

But respondents contend that their business is not in violation of §§ 2464, 2465, and 2466 of Rem. Code (P. C. §§ 8965, 8966, 8967), with reference to lotteries, drawings and games of chance, and that the ordinance must not be construed as being broader or more inclusive than the statute. They do not, however, cite any authorities in support of this contention. This court, in a number of cases, has held that ordinances of this character may be enforced, even though they be broader and more inclusive than statutes upon the same general subjects. *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324; *Seattle v. MacDonald*, 47 Wash. 298, 91 Pac. 952, 17 L. R. A. (N. S.) 49; *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855; *Seattle v. Hewetson*, 95 Wash. 612, 164 Pac. 234.

It is not, therefore, necessary for us to determine whether the business done by the respondents is in violation of the provisions of the sections of the statute above noticed. The city was threatening to enforce its ordinance, and it alone has appealed. The county officials have not appealed. The judgment is reversed and the case remanded for proceedings in accordance herewith.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16617. Department Two. January 11, 1922.]

MARY JOSEPHINE HUGHES, *Respondent*, v. PHILIP
HUGHES, *Appellant*.¹

APPEAL (416)—REVIEW—FINDINGS. Though a divorce action is triable *de novo* on appeal, the findings of the trial court on conflicting evidence are of great weight, in view of the fact that it saw the witnesses and their demeanor and was in a better position to pass upon their credibility.

DIVORCE (80)—DIVISION OF PROPERTY—AWARD. Where the community property of a husband and wife was of the value of \$26,000 an award of \$8,000 and \$125 per month alimony on decreeing a divorce in favor of the wife was not excessive.

SAME (62, 63)—ALIMONY AND SUIT MONEY—AMOUNT. In a divorce action, where the property rights involved amounted to \$26,000 in value, an award in behalf of the wife of \$650 attorney's fees, \$60 per month for the support of three children whose custody was awarded to her, \$200 per month temporary alimony and a further allowance pending appeal of \$75 suit money, \$500 attorney's fees and \$100 per month was not unreasonable.

MACKINTOSH, J., dissents.

Cross-appeals from a judgment of the superior court for Walla Walla county, Mills, J., entered April 2, 1921, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

E. L. Casey and *H. B. Noland*, for appellant.

Sharpstein, Smith & Sharpstein, for respondent.

HOLCOMB, J.—This is a bitterly contested divorce suit in which the court made findings and conclusions in favor of the wife, and a decree accordingly. On October 8, 1920, respondent filed her complaint, alleging two causes for divorce—nonsupport and cruelty. The complaint alleges that there are three children, of the ages of eight years, five years, and seven months; and that there is community property of the value of

¹Reported in 203 Pac. 376.

Jan. 1922]

Opinion Per HOLCOMB, J.

\$45,000. Respondent prayed for the custody of the children; for \$200 per month temporary alimony; for an absolute divorce; and for attorney's fees. On November 1, 1920, an order was made requiring appellant to pay into court \$50 for costs, \$400 on account of attorney's fees, and \$200 per month temporary alimony. On February 24, 1921, appellant made answer to the complaint, denying the allegations of nonsupport and cruelty, and as a separate, affirmative recriminatory defense, alleged misconduct on the part of respondent in her relations with a brother of appellant, which misconduct caused notoriety and gossip and rendered appellant's life miserable, and justified his conduct toward her. On March 5, 1921, after a trial, the court made findings, conclusions and a decree granting respondent a divorce; awarding her the custody of the children; and ordering appellant to pay her \$125 per month until October 1, 1921, and on October 1, 1921, and the first day of each year thereafter, the sum of \$1,000, until eight payments of \$1,000 each had been paid, with six per cent interest on all of those amounts until fully paid. After October 1, 1921, appellant was also required to pay \$60 per month until the children reached the age of eighteen years. The sum of \$250 was allowed as additional attorney's fees. A lien upon the lands of the parties is decreed in favor of respondent to secure the payment of the \$8,000 and the \$125 per month; and except for such lien, the property of the parties is awarded to appellant. The court found the property to be community property of the value of \$30,000, against which there was an indebtedness of \$4,000 owing by appellant.

Appellant assigns as errors the making of ten of the eighteen findings of fact; the making of the conclusions of law; the refusal to dismiss the action; the granting of a decree against appellant; the awarding

to respondent of \$8,000 and \$125 per month and making the same a lien upon appellant's land; requiring appellant to pay \$400 and \$250 attorney's fees, and \$60 per month to respondent's children after October 1, 1921; requiring appellant to pay \$200 per month temporary alimony; and allowing \$75 suit money, \$500 attorney's fees on appeal, and \$100 per month to respondent pending the appeal.

Respondent also cross-appealed on the eighteenth finding of fact made by the court, that the net value of the interest of the parties in the property was \$26,000, and the decreeing to respondent only the sum of \$8,000, instead of \$13,000, together with the other sums to be paid as alimony, suit money, money for the support of the children and attorney's fees.

We have diligently examined the entire record. It would serve no good purpose to relate the evidence introduced or offered at the trial. Discussion in detail would be utterly profitless. The trial court saw the witnesses and their demeanor and found in favor of respondent. There was sharp conflict in the evidence. It is true there were more witnesses who testified in behalf of appellant than in behalf of respondent; but we have frequently announced that, though in a divorce suit the trial here is one *de novo*, the findings of the trial court upon conflicting evidence are entitled to great weight. We are in no position to pass upon the credibility of the witnesses. *Rogers v. Rogers*, 81 Wash. 502, 142 Pac. 1150; *Glenn v. Glenn*, 84 Wash. 215, 146 Pac. 619. These cases cited many of our previous decisions to the above effect.

We said in *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634, that:

“In cases of this kind there is often an atmosphere apparent at the trial, sometimes elusive, but none the

Jan. 1922] Dissenting Opinion Per MACKINTOSH, J.

less palpable to the trial court, which is seldom fully manifested in the written record.”

The trial court could have found either way; and, having carefully scrutinized the findings of fact and examined the evidence shown in the record, we are unable to say that the evidence preponderates against the trial court's findings in any respect. Suffice it to say that, by way of recrimination, the endeavor of appellant tended very largely to cast infamy upon respondent and two of the children by accusations of infidelity upon the part of respondent, which the trial court found were not sustained.

As to the disposition of the property, we consider the award made to respondent very lenient to appellant, in view of the trial court's findings. Nor are we disposed, upon the entire record, to disturb the allowances made for alimony, support of the children, suit money, attorney's fees, and for alimony and attorney's fees pending appeal, upon the appeal of either appellant or respondent.

The decree is in all respects affirmed.

FULLEBTON, MAIN, and HOVEY, JJ., concur.

MACKINTOSH, J. (dissenting).—The testimony does not lead me to believe that the respondent was entitled to a divorce. Until this opinion was written, it was not the law that a wife could, by brazen immorality, give, not her husband, but herself, good ground for divorce. The rewards ought to be to the virtuous.

[No. 16593. Department Two. January 11, 1922.]

A. SMITH *et al.*, Respondents, v. TOWN OF TUKWILA,
Appellant.¹

MUNICIPAL CORPORATIONS (165)—PUBLIC IMPROVEMENTS—CONTRACT—ABANDONMENT BY CONTRACTOR—EVIDENCE—SUFFICIENCY. Where contractors on public work abandon their contract, they thereby create an anticipatory breach which furnishes an excuse for non-performance on the part of the other party.

SAME (166)—CONTRACT—PERFORMANCE—APPROVAL OR CERTIFICATE OF OFFICERS—NECESSITY. Where it is a prerequisite to the right of a public contractor to recover an installment payment due on a street improvement contract that he shall procure a certificate by the street committee stating the amount earned, a report by one member of the street committee to the town council of what is due the contractor will not excuse the nonproduction of the certificate.

SAME (157, 158)—CONTRACTOR'S BOND—VALIDITY—COMMON LAW BOND. Where a bond taken to secure the faithful performance of a public contract does not comply with the statutory requirements that it have more than one surety and be for the full amount of the contract price, it is nevertheless valid as a common law bond.

PRINCIPAL AND SURETY (3)—EXECUTION OF BOND—BY COSURETY. A surety on a contractor's bond on public work who signs on the understanding that another surety is to be procured, cannot escape liability where the bond is accepted by the obligee with no notice of such condition.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 22, 1920, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Jones & Colvin, for appellant.

Houser & Davis, for respondents.

MACKINTOSH, J.—Smith and Fielding, whom we will hereafter call the respondents, were the contractors for certain street grading in the town of Tukwila. They furnished a bond, with Lee Monohon, whom we will

¹Reported in 203 Pac. 369.

Jan. 1922]

Opinion Per MACKINTOSH, J.

hereafter call the bondsman, as surety. This action is to recover from the town damages for the alleged breach of contract.

It was provided in the contract that, on the 16th of every month, the appellant would pay to the respondents, on certificate of the street committee, eighty per cent of the contract price of the work completed during the preceding month. The breach alleged is that appellant failed to pay the installment due on September 16, 1920, which amounted to \$800, "as shown by the certificate of street committee", together with certain other sums on account of extra work. It is alleged that, on September 16, demand was made on the appellant, which refused to pay the sums demanded; that demand was then made on the 18th of September and again refused, and at that time the respondents declared the contract forfeited. The Citizens' Bank of Renton, being the assignee of certain laborers' claims, recovered a judgment against the appellant and the bondsman, which had been paid by the appellant under a stipulation that such payment shall be without prejudice to the parties to this appeal.

In the appellant's answer it denies the breach of the contract, and that the amount had been certified, and alleges that, prior to September 16, respondents had quit and abandoned the work and refused to proceed further with it, and, as a cross-complaint, asked for judgment against the respondents and their bondsman, based on the abandonment of the work prior to September 16, the appellant claiming to have been put to the expense of completing the work left unfinished in a sum in excess of the contract price. This cross-complaint was answered by a general denial.

As between the appellant and the bondsman, it is alleged that, at the time of signing the bond, it was the intention that two bondsmen should be secured, and that

the bondsman was told by the respondents that they were not to file the bond until the other surety had signed, and it is therefore claimed that the bond was void.

There are but two questions presented by this appeal: First, which raises a question of fact, is whether the respondents had quit and abandoned the work prior to September 16, when a payment would be due them. This question first makes necessary an examination of the testimony in the case, and to our minds it overwhelmingly preponderates against the findings of the trial court that there had not been such abandonment. A number of citizens, whose credibility is unquestionable, testified that the contractors, prior to September 16, realized that they were engaged in a very unprofitable undertaking and had decided to, and in fact had, abandoned further work on the contract. It is unnecessary to detail all of the testimony which forces this conclusion upon us. It is only denied by the very uncertain testimony of one of the respondents, which denial is attempted to be corroborated by the equally uncertain evidence of two or three employees. Altogether, it is far from satisfactory, and cannot have the effect of overcoming the reasonable and positive testimony to the contrary. The respondents, having repudiated their contract, had created an anticipatory breach of it, which furnished an excuse for the other party not performing its part. *Victor Safe & Lock Co. v. O'Neil*, 48 Wash. 176, 93 Pac. 214; *Calhoun, Denny & Ewing v. Pederson*, 85 Wash. 630, 149 Pac. 25.

Furthermore, upon this first point, the record establishes that respondents have failed to produce or request a certificate from the street committee, which was made by the contract a prerequisite to recovery of the installment due on the 16th of every month, and without such certificates the respondents could not

Jan. 1922]

Opinion Per MACKINTOSH, J.

recover such installments unless the certificates had been unfairly withheld. *Craig v. Geddis*, 4 Wash. 390, 30 Pac. 396; *DeMattos v. Jordan*, 15 Wash. 378, 46 Pac. 402; *Colby v. Interlaken Land Co.*, 88 Wash. 196, 152 Pac. 994; *School District No. 75 v. Qualls*, 95 Wash. 247, 163 Pac. 761. Although the respondents alleged that such a certificate was in existence, this allegation was denied by the appellant, and no proof was produced to show the certificate had ever been issued or demanded. The necessity of producing such certificate is sought to be avoided by the respondents on the ground that one Kline, who was a member of the town council, and also the city engineer and a member of the street committee, had, on September 11, reported to the town council the amount that was then due to the respondents. But such a statement did not purport to be a certificate of the amount due on the 16th. According to the terms of the contract, a certificate was to be made, and surely this statement cannot amount to a certificate signed "by the street committee", and there is no evidence that there was any conduct on the part of the appellant which amounted to wrongful, fraudulent, arbitrary or unlawful refusal to allow the certificate to be made on the date called for by the contract. The truth is, that before that date the contract had been abandoned by the respondents.

Passing now to the second question, which involves the liability of the bondsman, it is to be noticed that the bond was furnished with but one surety. Sections 1159, 1159-1, 1160, 1161 and 1161-1, Rem. Code (P. C. §§ 9724, 9725, 9726, 9727, 9728), are in regard to bonds to be required on public work and provide that the town shall require bonds with two or more sureties, or with a surety company as surety, that the contract shall be faithfully performed, and that all laborers, etc., shall be paid, and provide that, when a municipal cor-

poration shall fail to take such bond, it shall be liable to the full extent of the contract liability. They also provide that bonds shall be equal in amount to the full contract price.

The bond here does not meet any of the requirements of the statutes. It had but one surety and was not for the full amount of the contract price. The bond is, therefore, not a statutory bond, and the question is whether it is good as a common law bond. We take it that the statutes cited do not compel the municipality to exact the bond there provided for, but that it may elect to proceed with the work under other guarantees of its performance, taking the risk incident to failure to secure the statutory bond. There is no question that the appellant accepted the bond in good faith at the time it entered into the contract, and, so long as the law does not provide that the municipality shall not take a bond other than that provided for in the statute, or that such bond if taken shall be without effect, we are constrained to hold that the bondsman will be liable as upon the common law bond. *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; *Pacific Bridge Co. v. United States F. & G. Co.*, 33 Wash. 47, 73 Pac. 772. The bond was taken by the appellant without any communication with the bondsman, although it may be true that, when the bond was delivered by the bondsman to the respondents, it was delivered with the understanding that another surety's signature was to be placed thereon before it was submitted to the appellant. *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26; *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29; *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A 767. A discussion of the cases which relieve persons signing the bond as surety, which has been delivered in such a way that the person receiving it must have

Jan. 1922]

Opinion Per MACKINTOSH, J.

been charged with constructive notice that it was not intended to operate except upon compliance with certain conditions, is unnecessary here because there is nothing in this record that would justify a finding that the appellant either had actual or constructive notice of any conditions alleged to exist in this regard. This rule is recognized and stated in 21 R. C. L. 968, as follows:

“Hence, the rule sustained by the great weight of authority is that the agreement of a surety with his principal that the latter shall not deliver a bond till the signature of another be procured as a cosurety will not relieve the surety of his liability on the bond, although the cosurety is not obtained, where there is nothing on the face of the bond, or in the attending circumstances, to apprise the taker that such further signature was called for, in order to complete the instrument. In such cases the surety, having invested his principal with apparent authority to deliver the bond, is estopped to deny his obligation to the innocent holder, on the principle that where one of two innocent persons must suffer, the loss must fall upon him who put it in the power of the third person to cause the loss.”

For these reasons we are compelled to reverse the judgment of the lower court, and to order a judgment entered against the respondents for the amount of the damage occasioned by their breach of the contract, in the sum of \$4,932.35, with interest at six per cent from May 26, 1920, the judgment to provide that it shall also run against the bondsman for any surplus after the satisfaction of the judgment entered in this case in favor of the Citizens' Bank, the total liability of the bondsman upon both judgments not to exceed the principal amount named in the bond, to wit, \$3,000. The judgment is reversed with award of costs to the appellant.

PARKER, C. J., MAIN, and HOLCOMB, JJ., concur.

HOVEY, J., concurs in the result.

[No. 16551. Department One. January 11, 1922.]

THE CITY OF RAYMOND, *Respondent*, v. B. F. ARMSTRONG
et al., *Appellants*, PACIFIC & EASTERN RAILWAY
COMPANY, *Respondent*.¹

WATERS AND WATER COURSES (68)—CONTRACTS—GRANT OF EASEMENT — DEEDS — RIGHTS OF SUBSEQUENT GRANTEEES — CONSTRUCTION. Where the owner of lands grants to a water company the sole right to take, carry away and use all the water from certain streams flowing over or across his lands, in consideration of an annual rental, an easement in the land is created, and the right to such annual rental passes to any subsequent grantee who acquires the land by warranty deed, subject to the water company's easement.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered April 27, 1921, upon findings in favor of certain defendants, in an action in interpleader, tried to the court. Affirmed.

Fred M. Bond, for appellants.

Welsh & Welsh, for respondent.

MITCHELL, J.—B. F. Armstrong and Minnie R. Armstrong, husband and wife, were the owners of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 24, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 13, township 14, north, of range 9, west, W. M., in Pacific county, and on June 19, 1906, entered into a contract with the Raymond Light & Water Company, at that time operating a water system and supplying water to the town of Raymond, to the effect and upon terms as follows:

“Now Therefore, for and in consideration of the sum of \$75 to be paid to the first parties by the second party on or before the first day of April of each and every year in advance, the said parties of the first part do sell and convey, unto the party of the second part, its successors and assigns forever, the sole and ex-

¹Reported in 203 Pac. 50.

Jan. 1922]

Opinion Per MITCHELL, J.

clusive right to take, carry away and use all water of and from said two certain streams of water, creeks or springs, which are upon or flowing over or across said land above described. Also the right to enter upon said land, or any part thereof and to build dams, reservoirs, tanks, pumping station, water flumes or water pipes, and to renew, repair, alter, take up, change, relay and maintain the same or any part thereof, and to take and use said water or any part thereof in such manner as the second party may desire.”

It was further agreed if the second party failed to pay the \$75 when due, or for ten days thereafter upon written demand, the first parties could terminate the contract.

The Raymond Light & Water Company entered upon the lands and made the necessary improvements, including the placing of pipe lines for conveying water to the town of Raymond, which system is still being used for that purpose. On October 24, 1912, Armstrong and wife executed and delivered to A. C. Little a warranty deed to the real property, providing in the deed as follows:

“This conveyance is subject to an easement and water rights according to the terms of one certain contract executed June 19, 1906, and recorded in volume 32 of deeds on page 633. Said contract conveying the right to the Raymond Light & Water Company, a corporation, to take and use the water in two certain streams or creeks running over and across the above-described lands.”

On November 2, 1912, A. C. Little and wife executed and delivered to the Pacific & Eastern Railway Company a warranty deed to the real property, and provided in the deed as follows:

“This conveyance is subject to an easement and water rights according to the terms of one certain contract executed June 19, 1906, and recorded in volume

32 of deeds on page 633. Said contract conveyed the right to the Raymond Light & Water Company, a corporation, to take and use the water in two certain streams or creeks running over and across the above described lands.”

Subsequent to the dates of the above mentioned instruments, the Raymond Light & Water Company transferred all its rights and privileges under its contract with Armstrong and wife to the Raymond Water Company, which latter company transferred all its rights and privileges under the contract to the city of Raymond, on May 17, 1915. The city being unable to decide who was entitled to the rentals due, commenced this action in interpleader against the defendants and deposited into the registry of the court three years’ rental already due. The superior court decided that the Pacific & Eastern Railway Company was entitled to the funds, and from that judgment the Armstrongs have appealed.

The question presented depends upon the nature of the rights conveyed by the Armstrongs to the Raymond Light & Water Company on June 19, 1906. That instrument conveyed “unto the party of the second part, its successors and assigns forever, the sole and exclusive right to *take, carry away and use all water* of and from said two certain streams of water, creeks or springs, which are upon or flowing over or across said land above described”, together with the right of entry and the doing of certain things necessary to accomplish the primary purpose. The character of the instrument is essentially similar to the one that was under consideration in *Raymond v. Willapa Power Co.*, 102 Wash. 278, 172 Pac. 1176, which granted “unto the party of the second part, its successors and assigns, the exclusive right and privilege to *take and appro-*

Jan. 1922]

Opinion Per MITCHELL, J.

priate to its own use for any and all purposes any or all of the water flowing, etc.," together with the right to enter and lay flumes and pipes and the right of repairing, relaying and renewing them so as to conduct the water, with the right also to overflow and flood back the water upon all of the lands, of which it was said: "No title to the water itself passed by the deed, which, by its terms, merely granted the privilege of taking and appropriating the water and performing certain acts essential to the accomplishment of such purpose."

Appellants contend the contract with the Raymond Light & Water Company created an easement in gross. It may be admitted. When the easement was created, the fee of the land remained in the grantors, the Armstrongs, subject to the conditional easement, and as said in the case of *Pinkum v. City of Eau Claire*, 81 Wis. 301, 51 N. W. 550, "being the owners in fee of the land, they could, of course, convey it to another; and their grantee would stand in their shoes." In this case the Pacific & Eastern Railway Company does not claim as an assignee of a mere right of action in favor of the Armstrongs in the sum of \$75 per annum rental for the privilege the city enjoys, but it claims as a subsequent grantee and owner in fee of lands burdened with an easement granted upon condition and, standing in the shoes of its original grantors, is entitled to receive the \$75 per year, just as the Armstrongs would had they never conveyed the fee. The case is similar to that of a conveyance by the owner of leased premises which carries to the grantee in the deed rents subsequently accruing.

The warranty deeds from Armstrong and wife to Little and from Little and wife to the Pacific & Eastern Railway Company were made without any reservation or exception, but subject to an easement, which was

manifestly referred to in the deeds to prevent liability on the general covenant of warranty contained in each of those deeds.

Judgment affirmed.

PARKER, C. J., TOLMAN, and BRIDGES, JJ., concur.

[No. 16722. Department One. January 11, 1922.]

PAUL CALMER *et al.*, Respondents, v. JOHN MILLS DAY
et al., Appellants, F. B. HURSLEY, Defendant.¹

LOGS AND LOGGING (21, 22) — LABOR LIENS — REMEDIES OF LIEN CLAIMANTS—PROPERTY SUBJECT TO LIEN—STATUTES — CONSTRUCTION. Under Rem. Code, § 1149, giving every person performing labor in the operation of any "sawmill, lumber, or timber company" a prior lien on all the real and personal property of the employer used in the operation of the business, for moneys due for labor performed within six months next preceding the filing of a claim therefor, a laborer's lien for work in logging operations takes precedence over a chattel mortgage of the equipment of a logging company.

SAME (21, 22). Rem. Code, § 1162, giving loggers a lien upon the product of their labor, and Id., § 1149, giving laborers a lien upon all the property of the employer used in the operation of the business, afford merely cumulative remedies, requiring no election between them, since they are not inconsistent.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered May 21, 1921, in favor of the plaintiffs, in an action to foreclose logger's liens, tried to the court. Affirmed.

John Mills Day and Hartman & Hartman, for appellants.

Tucker & Hyland (Mary H. Alvord and Ford Q. Elvidge, of counsel), for respondents.

¹Reported in 203 Pac. 71.

Jan. 1922]

Opinion Per TOLMAN, J.

TOLMAN, J.—Appellant John Mills Day was, during the year 1920, engaged in the logging business in Kitsap county, cutting saw logs upon the lands of certain Indian allottees, and by the use of donkey engines, motor trucks, etc., removing and transporting the logs when cut to a temporary wharf in the waters of Puget Sound, where the logs were boomed and sold to saw mill operators as opportunity offered.

On September 13, 1920, he gave a chattel mortgage to the appellant Northwest Trust & Savings Bank, covering all of his engines, trucks, tools, logging and camp equipment, to secure the payment of \$5,500 of borrowed money, which mortgage, by reason of a misunderstanding, was not filed for record within the ten-day period. Learning of this fact, the bank caused a new mortgage to be drawn and duly executed on November 16, 1920, which was duly filed of record on November 18, 1920.

Thereafter respondents, who were laborers employed by appellant Day in his logging operations, caused their lien claims to be duly filed for wages earned largely before the filing of the chattel mortgage, upon all of the logs then remaining in the possession of the appellant Day, and also upon all of the equipment covered by the chattel mortgage, and brought this suit to foreclose such liens. The action was prosecuted under Rem. Code, § 1172 *et seq.* (P. C. § 9689 *et seq.*), and under § 1174 (P. C. § 9691), appellants filed with their answers, motions and demurrers raising the question of whether respondents are limited to the right of lien upon the saw logs only, as provided by Rem. Code, § 1162 (P. C. § 9679), or may, under § 1149, Rem. Code (P. C. § 9737), enforce their liens also against the equipment. From a decree adjudging the liens to be prior to the chattel mortgage, upon all of the property

in the mortgage described, appellants have brought the case here for review.

No question was raised below, nor is any raised here, as to respondents' lien rights against the logs, but it is strenuously contended that respondents are not entitled to a dual lien or a cumulative remedy giving them the benefit of both of the statutes hereinbefore referred to.

The logger's lien act, § 1162, Rem. Code (P.C. §9679), is the earlier in time, and it provides, in brief, that every person performing labor upon or assisting in obtaining saw logs shall have a lien thereon for his work and services, and subsequent sections provide for the filing and the enforcement of the lien. The employee's lien act, § 1149, Rem. Code (P. C. § 9737), subsequently enacted, provides:

“§ 1149. Laborer's Lien on Property, Franchises, Etc.—Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien.”

The subsequent sections provide for filing, service of notice, and that foreclosure may be had “in the same manner as mechanic's liens are foreclosed.”

The question here presented is a new one in this state, and though each party cites a number of our prior decisions as tending to sustain his position, we find nothing in any of them which is at all helpful, except

Jan. 1922]

Opinion Per TOLMAN, J.

that they recognize that these statutes are remedial in their nature and must be liberally construed.

Nor are the authorities from other jurisdictions such as to lead us to a clear and speedy answer. Respondent cites *Faircloth v. Webb*, 125 Ga. 230, 53 S. E. 592, and *Garrick v. Jones*, 2 Ga. App. 382, 58 S. E. 543, but the Georgia statute upon which these decisions rest is so different from our own as to make even a discussion of those cases futile. Appellant chiefly relies upon the case of *Pardee's Appeal*, 100 Pa. St. 408. There it appears a logging contractor ceased work, discharged his laborers without paying them in full, and removed his teams and equipment, in good faith, to his farm some ten miles distant, where they were levied upon and sold by a judgment creditor, and thereafter the laborers sought to enforce their liens against the fund in the sheriff's hands arising from such sale. The court, in denying the right to a lien, after setting out the gist of the statute under which the liens were sought to be enforced, said:

“The words, ‘works, mines, manufactory,’ thus employed in the act, have a definite signification, well understood in their general and popular acceptation. Ex vi termini the branches of business intended to be described by them are, in a certain sense, complete and independent, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to any particular branch of business. It will scarcely be pretended that either of these words fitly describes the business in which appellant was employed. It is contended however that the expression ‘other business,’ etc., is sufficiently comprehensive to embrace cutting and driving logs. Perhaps it would, if we were at liberty to construe it without reference to the context; but the preceding words, designating particular branches of business with which the idea of permanency and completeness, in a certain sense, is always associated, must control the meaning of the

more general expression used in immediate connection therewith. The 'other business' is ejusdem generis with that more particularly described by the preceding words of the context, business of the same general character, not embracing every species of employment in which the services of others may be rendered."

Clearly this does not meet our present question. We are asked to define the words of our statute, "any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company," as not including one engaged in logging; or, in other words, to hold that "sawmill, lumber or timber company," cannot include one engaged in getting out logs or timbers to be sold or transported to a mill for manufacture.

We may put aside everything but the words "timber company" and we then have a statute reading, "Every person performing labor for any person, company or corporation in the operation of any . . . timber company, shall have a prior lien," etc., and we must determine whether the getting out of saw logs is included in the operations of a timber company. The Standard Dictionary defines the word "timber" thus:

"1. Wood of suitable size and quality for building and allied purposes, cut, squared, sawed, or otherwise prepared for use, especially the larger forms of lumber adapted for beams, scantling, etc. 2. Growing or standing trees from which such wood may be obtained, often called standing timber; in English law, oak, ash, and elm, and sometimes, by local custom, other kinds of trees. 3. A single piece or squared stick of wood prepared for use, or already in use, in framing; a wooden beam; as, the *timbers* of the house are still strong."

While Webster's New International Dictionary, among other things, includes:

Jan. 1922]

Opinion Per TOLMAN, J.

“1. Wood. Obs. or R. exc. specif.: a. Wood suitable for use in buildings, carpentry, etc., whether in the tree or cut and seasoned. b. Forest land covered by trees producing such wood. Western U. S. c.=Lumber n., 3. Eng.”

“The term ‘timber’, as commonly used in this country, signifies either growing trees or large sticks, and is not commonly applied to smaller pieces or rails or cordwood into which the larger pieces may be worked up.” *Anderson v. Miami Lumber Co.*, 59 Ore. 149, 116 Pac. 1056.

See, also, *Butler & Barrow v. McPherson Bros.*, 95 Miss. 635, 49 South. 257.

Were we to indulge in a strict construction we might determine that the legislature had in mind, in using the words “timber company,” not a company manufacturing timbers in sizes suitable for building and allied purposes, or squared sticks of wood ready for use, because these operations are covered by the words which precede “timber company” in the statute, the phrase reading “sawmill, lumber or timber company”, but only had in mind a concern engaged in growing standing timber; but even so, would not one engaged in growing standing timber, of necessity, in order to market his product, be at times obliged to cut and transport the logs, and should not his employees, whether engaged in protecting and preserving the growing timber, or in cutting and transporting it to market, be equally favored by the law?

However, accepting a liberal construction, as we must, does it not seem clearly the legislative intent to protect equally all employees, whether employed at a sawmill in cutting logs into lumber or timbers, by a lumber company in the manufacturing, transportation, and disposition of its products, or by a timber company in any of its operations incident to its business, from the growing of the tree to and including its severance

and sale? If such was not the legislative intent and it had been considered that logging operations were not covered by the terms used, would not the legislature (since already, by § 1163, Rem. Code; P. C. § 9680, of the earlier act, those employed in manufacturing sawlogs into lumber and other timber products were protected just as those employed in logging were protected by § 1162; P. C. § 9679) have used the term "logging company"?

We are of the opinion that, in enacting § 1149, Rem. Code (P. C. § 9737), the legislature was dealing with liens of employees generally, and meant to use broad terms including all employees who, by a liberal construction, could be brought under the terms used, whether by other legislative acts they already had a right of lien or not, and the phrase "sawmill, lumber or timber company" was intended to cover all those engaged in the timber and lumber business who performed any service for any employer engaged in any part of the work required to reduce the tree from a living part of the forest to merchandise, or to that state of manufacture where it becomes an ordinary subject of commerce. Any other construction would discriminate between those employed by a sawmill or lumber company and those employed by a logging operator, to the advantage of the former, and we see no reason why the legislature should intentionally so discriminate.

If, then, the legislature did not intend to discriminate between the different classes of employees engaged in transmuting standing timber into a commercial form, it follows that it did intend, by the enactment of the later statute, to supplement or add to the security given to each class by the earlier statute; and to permit each, in addition to the right to a lien upon the thing produced, to claim also a lien upon the other and more

Jan. 1922]

Concurring Opinion Per BRIDGES, J.

permanent assets of the employer which are described in the later statute. If this be so, then each should have what appellants term a "dual lien" or "cumulative remedy." But one objective is sought, i. e., the payment of the wages due; but one payment can be obtained, and when the debt is paid the lien, as to all the property not consumed in making the payment, is discharged and the proceeding is at an end. We see nothing inconsistent here requiring an election of remedies, and where there is no inconsistency there need be no election. 9 R. C. L. 958; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1; *Moody v. Travis*, 76 Ga. 832, and *Itasca Cedar & Tie Co. v. Brainerd Lumber & Mercantile Co.*, 109 Minn. 120, 123 N. W. 58.

The judgment of the trial court is right and must be and is hereby affirmed.

PARKER, C. J., FULLERTON, and MITCHELL, JJ., concur.

BRIDGES, J. (concurring).—This case has given me no little trouble because of two conflicting ideas; first, that if the legislature intended by § 1149, Rem. Code (P. C. § 9737), to give the lien therein mentioned to one performing labor in the felling of timber and converting it into logs, why did it not expressly say so by adding "logging company" to the expression, "sawmill, lumber or timber company"? Everyone in this state knows that one working in the woods is a logger, and that the business of a logging company is the felling of timber and cutting it into logs. The other conflicting idea is, why should the legislature give this additional lien and relief to one manufacturing lumber out of logs and refuse to give it to one manufacturing logs out of felled timber, and thus, apparently without reason, show a preference for one class of labor over the other?

I have concluded, however, that the legislature by this act intended to give the extra lien and relief to a person engaged in what is commonly known in this state as logging. The opinion of Judge Tolman lays stress on the words "timber company", and concludes that those words include a logging company. To my mind the words "lumber company" much more nearly embrace the idea of a logging company. If we look entirely to the local use of the words "lumber company", it may be questionable whether the idea of logging is included within them. But generally in the United States the word "lumbering" means logging, as distinguished from converting the logs into the finished product. Webster's International Dictionary defines lumbering as "the business of cutting or getting timber or logs from the forest for lumber", and the word "lumber", used as a verb, as "to cut logs in the forest or prepare timber for market", and "lumberer" as one "employed in lumbering, cutting and getting logs from the forest for lumber." If, therefore, the words "lumber company", used in the statute, are given their broad meaning, they easily include the felling of trees in the forest and converting them into logs. I therefore concur in the opinion of Judge Tolman.

Jan. 1922]

Statement of Case.

[No. 16741. Department One. January 12, 1922.]

JOSEPH H. KUHN, *Appellant*, v. J. S. GROLL *et al.*,
Respondents.¹

SALES (168)—CONDITIONAL SALES—CONTRACT—CONSTRUCTION. Conditional sales contracts with forfeiture provisions are not favored by the law, and a court will not view a contract of sale as a conditional sale until it is clearly proven to be one.

PLEDGES (3) — WHAT CONSTITUTES — DELIVERY AND POSSESSION. Where the holder of corporate stock sells it to another, who pays part of the price and delivers promissory notes for the balance, the certificate of stock being left in the possession of the seller without any express agreement as to the purpose other than that he retain possession until the notes are paid, the transaction constitutes a pledge of such stock to secure the indebtedness of the purchaser, instead of a conditional sales contract.

BILLS AND NOTES (9, 137)—EXECUTION—LIABILITY—ACCOMMODATION MAKER. Under Rem. Code, § 3420, providing that an accommodation maker of a promissory note is liable thereon to a holder for value, the fact that one signs notes given for a sale of corporate stock in which he has no interest only as an accommodation maker, and that extension of time for the notes was granted without his knowledge or consent, would not exonerate him from liability.

HUSBAND AND WIFE (82)—COMMUNITY PROPERTY—DEBT OF HUSBAND—BILLS AND NOTES. A promissory note given by a husband to promote the financial welfare of a canning company in which he is interested, thereby redounding to the benefit of the community, is a community obligation.

Appeal from a judgment of the superior court for King county, Brinker, J., entered April 6, 1921, upon findings in favor of the defendants, in an action on promissory notes and to foreclose a pledge, tried to the court. Reversed.

R. H. Coshun and Preston, Thorgrimson & Turner,
for appellant.

Dan Earle, for respondents.

¹Reported in 203 Pac. 44.

PARKER, C. J.—The plaintiff, Kuhn, seeks recovery from the defendants and their communities upon three promissory notes, which are in form unconditional and negotiable, executed by defendants J. S. Groll and E. B. Burwell on September 30, 1918, whereby they promised to pay to the plaintiff \$500 on October 7, 1918; \$800 on October 10, 1918; and \$1,550 on December 1, 1918; and also seeks foreclosure of his claim of lien upon seventy shares of the capital stock of the San Juan Canning Company, the certificate for which he alleges, being the property of the defendants, was by them delivered to and left in his possession, at the time of the execution of the notes, as a pledge to secure the payment of the indebtedness so evidenced.

The defendants Groll and wife, while admitting the execution of the notes, separately pleaded, in substance, that the notes were given merely to evidence the amount of the unpaid balance upon the purchase price of a contract for the sale of the shares of stock to them by the plaintiff, whereby it was agreed that "the title to and possession of said stock certificate was to remain in the plaintiff until the payment of the entire purchase price"; that they had, before the execution of the notes, paid to plaintiff \$3,000 upon the purchase price of the stock, and that, after the execution of the notes, the contract for the sale of the stock had been rescinded by mutual agreement between them. This answer concludes with a prayer for an affirmative judgment against the plaintiff in the sum of \$3,000, and that the notes be canceled.

The defendants Burwell and wife, while admitting the execution of the notes, separately pleaded, in substance, that the defendant E. B. Burwell signed the notes only as an accommodation maker, without other consideration, as plaintiff was fully advised; that material extensions of time for the payment of the

Jan. 1922]

Opinion Per PARKER, C. J.

notes had been granted without his knowledge and consent; and further pleaded a mutual rescission of the contract for the sale of the stock, substantially as separately pleaded by the defendants Groll and wife. This answer concludes with a prayer for judgment absolving Burwell and wife from liability upon the notes.

The plaintiff's replies put in issue all the affirmative facts so pleaded in these answers. Upon the issues so made, a trial was had in the superior court for King county, which resulted in findings and a judgment denying to the plaintiff recovery upon the notes, and also denying to the defendants Groll and wife recovery upon their claim of \$3,000 made by them against the plaintiff. From this disposition of the cause in the superior court, the plaintiff has appealed to this court. The defendants Groll and wife did not appeal, but submitted to the judgment denying them recovery upon their claim of \$3,000 rested upon their claimed mutual rescission of the contract.

It is apparent, from the record of the trial of the case in the superior court, that counsel for respondents not only presented their case in that court upon the theory of mutual rescission of the stock sale contract, as pleaded, but also upon the theory that the contract was, in legal effect, a conditional sale, giving to appellant the right of forfeiture of all rights of respondents therein, including the \$3,000 paid upon the purchase price, which right of forfeiture appellant elected to exercise, and thereby waived his right to recover upon the notes evidencing the balance of the purchase price. The latter is the theory here principally relied upon by counsel for respondents to sustain the judgment; though it seems somewhat inconsistent with and a departure from the theory of the pleaded

defense of mutual rescission. The trial court also rested its judgment upon the theory that the contract was, in legal effect, a conditional sale, with right of forfeiture in appellant upon failure of payment of the purchase price, and that he had elected to exercise such right and thereby waived his right to sue upon the notes.

In view of the contentions here made, it seems necessary to go back to the beginning of the dealings of these parties between each other touching the sale of this stock. The evidence is not free from conflict, but we think the following facts are fairly well established thereby: In the year 1916, respondents Groll and Burwell were the owners of shares of stock in the San Juan Canning Company and were financially interested in the success of that company. While they were so interested, appellant Kuhn purchased the seventy shares of stock here in question. Just what Groll and Burwell had to do with the bringing about of that purchase, or who it was from—though there is a hint of its being from so-called treasury stock of the company—is not made plain; but that they were interested in having appellant make the purchase, and that, as an inducement for his doing so, they promised to repurchase the stock from him if he so desired, and thus induced him to make the purchase, is made to appear with fair certainty. The purchase was so made by Kuhn and a certificate for the shares caused to be issued to him accordingly, on May 16, 1916. Kuhn thereafter having requested that the stock be repurchased by Groll and Burwell, they made a contract with him accordingly. Soon thereafter they made two cash payments of \$1,000 each on the purchase price. The certificate of stock was retained by appellant, evidently as security for the payment of the balance of

Jan. 1922]

Opinion Per PARKER, C. J.

the purchase price. The record is silent, however, as to any express agreement as to appellant then retaining possession of the stock, or as to the purpose of such retention of possession; but that the sale then became completed, except as to the payment of the balance of the purchase price, we think is certain. There was then no express agreement as to time of payment of the balance of the purchase price; so, of course, the entire purchase price became immediately due. The two \$1,000 payments were made by Burwell by his own checks delivered to appellant.

After repeated fruitless demands for payment of the balance of the purchase price, made by appellant upon both Groll and Burwell, they all met together with a view of making a final settlement with reference to the payment of the balance of the purchase price. This occurred on September 30, 1918. Appellant supposed that he was then going to receive the payment of the entire purchase price in cash, and brought the stock certificate with him for delivery to Groll and Burwell. He was then informed that they could pay only a thousand dollars in cash at that time, but would give him their notes for the balance. This, appellant felt obliged to accept for the time being. The \$1,000 was then paid to appellant, and Burwell then computed the balance due, including some interest, the total of which was found to be \$2,850. Burwell then drew up these notes in his own handwriting and signed them; they being also then signed by Groll, and delivered to appellant. They then all agreed that appellant should retain the stock certificate until the notes were paid. There was no express agreement then made as to whether appellant should hold the stock certificate as a pledge, as security for the balance of the purchase price evidenced by the notes, or as upon a conditional

sale with right of forfeiture on his part. If this were all the information we had touching that question, it would seem to follow, almost as a matter of course, that the stock was left with appellant as a mere pledge to secure payment of the notes.

It is the acts and the words of the parties following the events above related which counsel for respondents argue put a construction by the parties themselves upon the contract for the sale of the stock which made it in legal effect a conditional sale, rather than a mere pledge of the shares of stock to secure the notes. Thereafter appellant made repeated demands upon Groll and Burwell for the payment of the notes. Being unsuccessful in such demands, he expressed his intention of selling the stock; and, indeed, seems to have gone so far as to offer it for sale. He did not, however, sell the stock, or come anywhere near doing so. He ceased his efforts in that behalf on being advised that he had no right to sell the stock, or cause it to be sold, except through legal foreclosure proceedings. According to Groll's testimony, appellant told him, at about the time appellant was attempting such sale of the stock, that the deal was "all off with us", and that he [Groll] assented thereto. This testimony, however we regard as quite unsatisfactory in the light of other testimony and the fact that thereafter, upon further demands made by appellant upon respondents for payment of the notes, such prior rescission of the contract was never asserted or claimed by either of them, but further time requested for payment of the notes. The notes were never surrendered by appellant, nor did he ever renounce in writing his right to the payment of the debt evidenced thereby.

Was the contract for the sale of the stock, or did it ever become, a conditional sale contract, as argued by counsel for respondents? We think not. We are to

Jan. 1922]

Opinion Per PARKER, C. J.

remember that conditional sales with forfeiture provisions therein are not favored by the law, and that a contract of sale must be clearly proven to be one of such conditional sale before a court will so view it. The general rule touching this question is well stated in 24 R. C. L. 446, as follows:

“Conditional sales are not favored in law, and where it is doubtful from the face of the instrument whether the contract is a conditional sale or a mortgage, the courts generally treat it as a mortgage, for the reason that such construction will be most apt to attain the ends of justice, and prevent fraud and oppression, . . .”

We are not unmindful of the argument of counsel for respondents that in this particular case there will result a greater injustice by holding this transaction to be, in legal effect, a pledge rather than a conditional sale, made seemingly because the disposition of this particular case against them may result in a deficiency judgment against them. But that does not argue against the general rule. If they were now insisting upon the return of the \$3,000 paid by them upon the purchase price, as pleaded in Groll's affirmative answer, their counsel would probably be invoking this general rule in support of such contention. The force of the rule is not impaired by the mere exigencies of a particular case. Counsel for respondents also invoke the rule as announced in our decision in *Lundberg v. Kitsap County Bank*, 79 Wash. 75, 139 Pac. 769, as follows:

“While it is a distinguishing feature of conditional sale contracts that the title to the property remains in the seller until payment of the purchase price, it is also held that this reservation of title may be implied. . . ;”

the argument being that the circumstances attending the making and alleged construing of this contract by

the parties thereto warrant the inference that they intended it to be a conditional sale contract.

We may, for argument's sake, concede this to be a correct statement of such general rule; but aside from the support such general rule may lend to respondents' ultimate claim here made, that decision, we think, does not aid them, for it involved a contract in writing which in express terms provided for a forfeiture to the vendor of "all payments already made" by the vendees upon their failure to complete payment of the full purchase price. The question was not so much as to the contract being one of conditional sale, as to there being any contract at all. When the latter question was decided in the affirmative, it followed, almost as a matter of course, that the sale was a conditional one, because of the express terms of forfeiture embodied in the receipt which was held to be a sale contract, against contentions made to the contrary. There are also cited by respondents' counsel the following decisions of this court as supporting the contention that this transaction was a conditional sale: *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Croup v. Humboldt Quartz & Placer Min. Co.*, 87 Wash. 248, 151 Pac. 493, L. R. A. 1918A 537; and *Barbour v. Hodge*, 99 Wash. 578, 170 Pac. 115. A critical reading of these decisions will disclose that they all relate to the exercise of a choice of remedy by vendors under conditional sale contracts which plainly were such. Those decisions do not involve the question of the existence of such contracts; that is, they all involve the question of whether the vendor had elected to reclaim the property or had elected to recover the purchase price thereof, there being no question of the

Jan. 1922]

Opinion Per PARKER, C. J.

nature of the contracts involved. Our later decision in *Jordan v. Peek*, 103 Wash. 94, 173 Pac. 726, cited by counsel for respondents, involved the respective claimed rights of the parties under the provisions of a statute of South Dakota not applicable here, and we think is of no controlling force in our present inquiry.

We have here: a sale unattended by any express agreement, written or oral, evidencing it to be a conditional sale; a final settlement between the parties as to the amount of the unpaid balance of the purchase price, made long after the making of the contract, and the execution and delivery by the vendees to the vendor of promissory notes, unconditional and negotiable in form, for such unpaid balance; the certificate for the stock so sold left in the possession of the vendor without any express agreement as to the purpose of so leaving it in his possession, but only that it remain in his possession until the notes are paid; and the possession of the notes up to the present time remaining with the appellant. These facts, we think, would of themselves render the inference all but conclusive that the certificate for the stock was left in appellant's possession merely as a pledge to secure the payment of the indebtedness evidenced thereby, without any right of forfeiture in him as against respondents.

Nor do we think there was, after the making of the notes, any such words or acts by the parties as amounted to a construction of the sale contract as being a conditional sale, even conceding that the contract as finally made—in any event, not later than the giving of the notes—was capable of such construction or change by anything short of a new contract. As we view the evidence, it does not show that appellant ever exercised such ownership over the certificate of stock as to estop him from now claiming his interest

therein as being nothing more than the lien he now claims. He did not surrender the notes or renounce his claim for the payment of the debt evidenced thereby, as provided by § 3512, Rem. Code (P. C. § 4193), which seems to be in effect in the nature of a statute of frauds touching the question of the makers of negotiable promissory notes being absolved from liability thereon other than by payment. *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941. These considerations, we think, also dispose of the contention of counsel for respondents rested upon the theory of mutual rescission of the contract, if indeed there be now any proper place in our present inquiry for the consideration of such contention.

Some contention is made in respondents' behalf that the leaving of the certificate of stock with appellant did not constitute a pledge thereof as security for the payment of the notes because there was not, at the time of the making of the notes, or thereafter, any actual physical delivery of the stock certificate by respondents, or either of them, to appellant. We think, plainly that was not necessary to constitute a pledge, since the stock certificate, being already in the possession of appellant, was, by agreement of the parties, left there with the understanding that it should so remain until the debt evidenced by the notes was fully paid. It is true that the law requires a delivery of the pledged property from the pledgor to the pledgee and a retention of it by the pledgee in order to make the pledge fully effectual as security. We think the law applicable to the situation we find here is well stated in 21 R. C. L. 643, as follows:

“The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception,

Jan. 1922]

Opinion Per PARKER, C. J.

for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. If, however, the pledgee has the thing already in his possession, the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge the moment the contract is completed.”

Some contention seems to be made in respondents' behalf, though it is somewhat obscured in their counsel's brief, that respondent Burwell is not liable upon the notes because he was not interested in the sale contract, was not one of the purchasers of the stock, signed the notes only as an accommodation maker, and there was a granting of extensions of time for the payment of the notes without his knowledge and consent. We think the answer to this contention is found in the fact that there is nothing upon the faces of the notes indicating that Burwell signed them in any other capacity than as maker. In § 3420, Rem. Code (P. C. § 4100), being a provision of our negotiable instruments act we read:

“An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.”

Our decisions in *Bradley Engineering and Manufacturing Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. 1127, and *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72, have given full force and effect to this provision of our negotiable instruments act. Besides, we think the evidence in this case calls for the conclusion that Burwell signed these notes, not as an accommodation maker, but as an original maker, for the purpose

of evidencing a debt for which he was as much obligated as was Groll, in that, as we think the evidence shows, he was a joint purchaser with Groll of the stock from appellant.

There is a suggestion in the brief of counsel for respondents—though seemingly not seriously argued—that in no event is the community consisting of Burwell and wife liable upon these notes. What we have already said seems to be sufficient to dispose of any such contention, against the community consisting of Burwell and wife. But, even should we regard Burwell as an accommodation maker of these notes, we still think, viewing the whole history of the dealings of these parties from the time respondents Groll and Burwell, upon the original purchase of the stock by appellant, agreed to repurchase it from him, manifestly to promote the financial welfare of the San Juan Canning Company, and in turn their own welfare, that all acts done and obligations incurred by Burwell were so connected and intended to redound to the benefit of the business of the community that the signing of these notes became a community obligation. We feel constrained to so hold, especially in view of the presumption that the signing of these notes by Burwell, as maker, was for the benefit of the community. The decisions of this court in *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435, and *Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402, lend support to this conclusion.

The judgment of the superior court is reversed, and the cause remanded to that court with instructions to enter judgment awarding foreclosure and recovery as prayed for in favor of appellant, Kuhn, and against all of the respondents, the Grolls and Burwells, including their communities, for the full amount of the

principal and interest due upon the notes. The superior court is further directed to award to appellant, Kuhn, a reasonable attorney's fee as a part of his costs and disbursements incurred in the prosecution of the case in that court, a question submitted to but left undetermined by that court because of the deciding of the case therein in favor of respondents.

BRIDGES, FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16912. Department Two. January 12, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Farmers State Bank of Kahlotus, Plaintiff*, v. THE SUPERIOR COURT FOR FRANKLIN COUNTY, *John Truax, Judge, Respondent*.¹

MANDAMUS (4)—TO COURTS—REMEDY BY APPEAL. The refusal of the trial court to permit suit against a receiver upon matters covered by a show cause order in the receivership proceedings does not entitle the petitioner to a writ of mandate to compel the court to assume jurisdiction, since the parties and the subject-matter are all before the court, and there is a remedy by appeal from any final judgment in the receivership proceedings.

Application filed in the supreme court November 2, 1921, for a writ of mandamus to compel the superior court for Franklin county, Truax, J., to assume jurisdiction of a cause. Denied.

Chas. W. Johnson, for relator.

E. M. Gibbons, for respondent.

MAIN, J.—This is an original application in this court for a writ of mandamus. The relator, the Farmers State Bank of Kahlotus, began an action in the su-

¹Reported in 203 Pac. 13.

perior court of Franklin county to foreclose certain chattel mortgages which it held upon property owned by one Simon Miller. After the action had been instituted, other actions involving the same property were consolidated with the action of the relator for the purpose of trial. A receiver was appointed to take charge of the property. On the 25th day of March, 1921, the receiver filed what he designated his final report. Prior to this day, a report of his doings as such receiver in the course of the administration of the estate had been filed and approved by the court. To this final report, certain objections were filed. On January 31, 1921, and prior to the final report, the court entered an order decreeing the foreclosure of the relator's mortgages; three in number, and establishing priorities between the relator and other claimants. After the final report was filed, and on April 14, 1921, the court entered an order sustaining the exceptions to it in part and directing that the receiver procure notes, properly secured, following in a general way the plan outlined in the court's memorandum opinion and which should be satisfactory to all parties concerned, and if this were done, the receiver's report would be allowed and approved in all respects except wherein the exceptions were allowed thereto. In the order the court reserved the right to disapprove and disallow any and all sales of property which had theretofore been made in which notes were taken in payment for such property.

On June 14, 1921, the relator presented a petition asking that the receiver be required to appear and show cause why he should not turn over to the relator certain property or the proceeds thereof. This petition was granted and the receiver was allowed two weeks in which to comply therewith. On September 13, 1921, the receiver tendered certain property then

in his possession to the relator. This tender apparently was not accepted, and on September 20, 1921, the relator served a demand upon the receiver for specific property. The matter came on to be heard upon the show cause order and the demand of the relator, and the court heard and considered the evidence offered and ordered that the show cause and demand for specific property be denied for the reason that the matters there involved had been adjudicated in the judgment of January 31, which fixed the rights and priorities of the relator and other parties, and the order of April 14, which approved the receiver's final account, after allowing certain exceptions thereto, and making the directions above referred to. On October 6, 1921, relator petitioned the court for permission to sue the receiver relative to the matters covered in the show cause order and the demand for specific property. The permission sought was denied because, as stated in the court's order, all matters covered by the petition had been previously adjudicated by the orders of April 14 and January 31, respectively. The relator, after this order last referred to was entered, made the application here for a writ of mandamus, seeking to compel the superior court to grant him a hearing upon the demand and show cause order, or, in the alternative, that he be permitted to sue the receiver.

It will be admitted that, if the trial court were refusing to proceed to a final determination of the receivership matter, or if he were refusing to take jurisdiction where such jurisdiction existed, a writ of mandamus is the proper remedy. From the record in this case it does not appear that the receiver, under the direction of the trial court, is not proceeding with reasonable dispatch to close up the affairs of the estate. The relator's principal contention seems to be

that the refusal of the trial court to order a trial upon the matter covered by his show cause order and demand was a refusal to take jurisdiction. This position is not well founded. The parties were all before the court, the subject-matter was before the court, the court had, prior thereto, made orders which it deemed final, and for that reason declined to enter upon another trial of the same issue. From any order that the trial court might enter in the case which finally disposed of the rights of the parties there was an appeal. *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628; *Colkett v. Hammond*, 101 Wash. 416, 172 Pac. 548.

The refusal of the trial court to hear and determine the matter covered by the show cause order and the demand was not a refusal to take jurisdiction. If a final judgment has not already been entered disposing of the rights of the relator, a final judgment must of necessity be entered when the receivership is finally closed and terminated.

The writ will be denied.

PARKER, C. J., HOLCOMB, BRIDGES, and HOVEY, JJ., concur.

Jan. 1922]

Opinion Per MAIN, J.

[No. 16697. Department Two. January 12, 1922.]

L. N. GOBEL, *Respondent*, v. M. FINKELBERG *et al.*,
Appellants.¹

TRIAL (69) — INSTRUCTIONS—PROVINCE OF JURY—ASSUMPTION BY JUDGE AS TO FACTS. In an action for negligence, in which one of the principal issues is whether there had been a collision between the automobiles of plaintiff and defendant, the assumption by the court in its instructions to the jury that there had been a collision constitutes prejudicial error.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 20, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained in an automobile collision. Reversed.

Reynolds, Ballinger & Hutson, for appellants.

J. P. Wall, for respondent.

MAIN, J.—The purpose of this action was to recover for personal injuries and damages to an automobile. The cause was tried to the court and a jury, and resulted in a verdict in the sum of \$5,312.23. A motion for new trial was made and, upon the hearing thereof, the court required the plaintiff to elect to omit from the verdict the sum of \$1,500; the motion otherwise would be granted. An election was made and judgment was entered for the sum of \$3,812.25. From this judgment, the defendants appeal.

On the 23d day of May, 1920, respondent was driving his Ford automobile on the Pacific Highway, going northerly, between Silver lake and the city of Everett, in Snohomish county. The appellant M. Finkelberg was proceeding in the same direction, the respondent's car being in front. Respondent was traveling at a

¹Reported in 203 Pac. 65.

speed of about twenty or twenty-five miles an hour, and appellant at about thirty miles per hour. The appellant speeded up and passed the car driven by the respondent. At this time the respondent's car went into a ditch at the side of the road and was somewhat damaged, and the respondent claims to have suffered personal injuries at the same time. The theory of the complaint is that, in passing, the car driven by the appellant struck the left front of the car driven by the respondent and caused it to leave the road and go into the ditch. The answer denies that there was any collision between the cars, and alleges affirmatively contributory negligence. It thus appears that one of the material issues in the case was whether the car driven by the appellant had struck or collided with that driven by the respondent.

One of the errors assigned relates to the instructions given, and complains that, in the instructions, there is an assumption of a question of fact which was the province of the jury to determine. The court, after defining negligence, told the jury that if, applying that definition, they should find the appellant, in the operation of his automobile, was not guilty of negligence in the manner as alleged in the complaint,—“which caused the collision whereby plaintiff sustained damage described in plaintiff's complaint, then your verdict should be for defendant.” The clause in the instruction complained of was that which assumed that there had been a collision. The court instructed the jury on contributory negligence, and in concluding that instruction told them that, if such negligence contributed to the “collision whereby plaintiff's automobile was damaged,” there could be no recovery. In another instruction the jury were told that, if the respondent's own negligence “contributed to the collision

Jan. 1922]

Opinion Per MAIN, J.

whereby he sustained his alleged injuries, he could not recover," although the jury might believe that the appellant was also guilty of negligence. The expression, "collision whereby plaintiff sustained the damage described in the plaintiff's complaint", appears substantially in the same form in two other places in the instructions. The conclusion cannot be escaped that, in making use of this expression, there was an assumption that there had been a collision, which was one of the principal issues in the case. The respondent, in the complaint, alleged that the appellant negligently drove his car into that of the respondent, striking respondent's car on the left front. This allegation is denied by the answer. Upon the trial, the plaintiff's witnesses testified that there had been a collision, in that the appellant's car struck the car of the respondent and caused it to go into the ditch. The witnesses for the appellant testifying upon this issue stated that there was no collision, and that in passing there was a space between the two cars of five or six feet. Clearly, one of the issues which the respondent was required to establish in order to sustain his right of recovery was that there was a colliding of the cars, or the striking of the respondent's car by that of the appellant. The complaint is drawn upon that theory, and the cause was directed upon the same theory.

It has been held by this court a number of times that where, in the instructions submitting a cause to the jury, there is an assumption of a material fact which the jury has a right to pass upon, this will constitute error. *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *French v. Seattle Traction Co.*, 26 Wash. 264, 66 Pac. 404; *State v. Dale*, 110 Wash. 181, 188 Pac. 473. It is argued by the respondent that the instructions were not prejudicial because in all of those where the

expression referred to occurs there is a conclusion that, if the facts stated in the instruction are found by the jury to be true, there can be no recovery, but we think this does not cure the error. The inference which the jury would draw from the instructions was that there had been a collision, and, as stated, this was one of the issues upon which the evidence was in dispute. It may be that the trial court inadvertently used the form of expression involved, but even though this may be, it would have the same effect as though the instructions had been deliberately framed embodying this expression. The case of the *State v. Manderville*, 37 Wash. 365, 79 Pac. 977, is not out of harmony with those above cited. In that case, in the instruction, there was an assumption of conceded facts which had been testified to. But assuming a conceded fact is different materially from assuming a controverted fact. The other errors assigned relate to matters which were incidental to the particular trial and are not likely to occur upon another trial of the action, and therefore it is unnecessary here to discuss them.

The judgment will be reversed, and the cause remanded with directions to the superior court to grant a new trial. Reversed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

Jan. 1922]

Opinion Per FULLERTON, J.

[No. 16437. Department One. January 12, 1922.]

G. M. PARSONS, *Respondent*, v. MRS. J. HAMRICK,
Appellant.¹

HIGHWAYS (52, 57)—AUTOMOBILES—NEGLIGENT USE—EVIDENCE—SUFFICIENCY. In an action for injuries to plaintiff's automobile as the result of a rear-end collision on a public highway, the findings of the trial court are sustained by proof that plaintiff's car was bumped into while all its lights were burning, and while traveling on a straight road, in view of the circumstance that defendant, if traveling at the moderate rate of speed testified to, could have seen plaintiff's car in time to have stopped.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 20, 1920, upon findings in favor of the plaintiff, in an action for damages sustained in an automobile collision, tried to the court. Affirmed.

J. Grattan O'Bryan, for appellant.

Roberts & Skeel and *N. A. Pearson*, for respondent.

FULLERTON, J.—The respondent, Parsons, brought this action against the appellant, Hamrick, to recover in damages for losses suffered by him, caused, as he alleges, from the negligent act of the appellant in driving her automobile into the rear of his own. The demand of the complaint was for injuries to his automobile, and for loss of its use while it was being repaired. The cause was tried by the court sitting without a jury, and resulted in a judgment in the respondent's favor for the sum of four hundred and fifty dollars.

As to the manner in which the accident happened, the evidence of the respective parties is widely divergent. The respondent's testimony is to the effect that

¹Reported in 203 Pac. 371.

he, with a party of friends, had, on the day of the accident, made a visit to Snoqualmie Falls; that, after he and his guests had taken dinner at that place at about six o'clock in the evening, he started on his return journey to Seattle; and that, while on the Bothell road, a public highway of King county, with all the lights on his automobile burning, and while driving on the right-hand side of the road at a speed not to exceed fifteen miles an hour, the appellant's automobile crashed into the rear of his automobile. The appellant's testimony, which all appears by deposition, while it does not deny that there was a collision, is to the effect that the appellant's automobile was being driven at about the rate of speed the respondent claimed to have been driving; that, when the driver of her automobile and its occupant discovered the respondent's automobile, it was about thirty feet in front of them, standing still, with no lights upon it at all; that another automobile behind them gave at that time a passing signal, and the driver, fearing a collision would result if he endeavored to pass the respondent's automobile on the left, put on the brakes in an endeavor to stop the machine, but, owing to the condition of the pavement, was unable to do so; that he then turned to the right against the bank on the side of the road, and that the collision was the result of the automobile sliding sideways against that of the respondent. All of the witnesses agree that it had been raining prior to the time of the collision and that the pavement was wet and slippery. All agree, also, that another automobile passed at about the time of the collision, going at a rapid rate of speed, some of the witnesses estimating the speed at fifty miles an hour.

There is not much in the surrounding circumstances that tends to throw light upon the dispute. What there

Jan. 1922]

Opinion Per FULLERTON, J.

is, however, tends in the respondent's favor. From certain expressions used by the appellant's witnesses in describing the conditions surrounding the accident, it is inferable that the driver of the automobile passing at the time of the collision commenced his attempt to pass the appellant's automobile at some distance back, and only succeeded in doing so when the appellant's driver was compelled to stop by the presence of the respondent's automobile in his track. The witnesses for the respondent also testify that they heard no passing signal, but that there was some shouting by the occupants of the passing automobile as it went by. Another circumstance is that the road was straight for a considerable distance on each side of the place of collision, that the track was level, and that the lights on the appellant's automobile were in good order and all burning. With these conditions existing, it hardly seems probable that, if the appellant's automobile was traveling at the very moderate rate of speed to which they testify, its occupants would have failed to discover the presence of the respondent's automobile in their path at a greater distance therefrom than thirty feet.

Further discussion is unnecessary. We find no preponderance of the evidence against the conclusions of the trial court, and its judgment will stand affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 16575. Department Two. January 13, 1922.]

BARNETT BROTHERS, *Appellant*, v. S. F. LYNN *et al.*,
Respondents.¹

CORPORATIONS—CONTRACTS—LIABILITY OF STOCKHOLDER OF CORPORATION. The presence of individual stockholders of a fruit growing corporation at a meeting between the corporation and a fruit buyer, in which such stockholders voted that the corporation sell the fruit of the members to the fruit buyer, would not create a contract liability against the individual stockholders.

FRAUDS, STATUTE OF (1)—PROMISE TO PAY DEBT OF ANOTHER. An oral promise by a stockholder of a corporation to become personally liable for its debts beyond the extent to which he stands liable under the law, being a promise to answer for the debt, default or mis-carriage of another, is unenforceable within the statute of frauds.

PRINCIPAL AND AGENT (52-1)—UNDISCLOSED AGENCY—LIABILITY OF AGENT. Where, at the time of entering into a contract, it is fully known by the parties thereto that it is made for the benefit of other parties, no question of undisclosed principal is involved, and the contract is enforceable only against the party named, without any right of recourse against the third parties who are beneficially interested.

EVIDENCE (156)—PAROL EVIDENCE TO VARY WRITING—PARTIES TO INSTRUMENT. Where a corporation entered into a written contract to sell the fruit of its stockholders, the contract cannot be varied by oral evidence that it was intended to bind the stockholders individually.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered December 2, 1920, upon sustaining a demurrer to the complaint, dismissing an action on contract. Affirmed.

Lee & Kimball, for appellant.

Freece & Pettijohn, for respondents.

HOLCOMB, J.—This appeal is by plaintiff from an order sustaining a demurrer to its amended complaint, and judgment of dismissal based thereon. The ground

¹Reported in 203 Pac. 387.

Jan. 1922]

Opinion Per HOLCOMB, J.

of demurrer, as sustained, is that the amended complaint does not state facts sufficient to constitute a cause of action.

Aside from the formal allegations, the amended complaint alleges substantially: That plaintiff, a foreign corporation, was engaged in buying fruit in Washington for shipment and sale wholly in interstate commerce; that it was offered defendants' fruit through the Peach Fruit Growers' Company, defendants being present at a stockholders' meeting of the company held for the express purpose of receiving offers from plaintiff and others for the fruit grown by defendants and others, defendants voting upon all motions relative to such matters, and voting in favor of accepting plaintiff's offer for all such fruit, including that grown by defendants; that the price of each kind of fruit is specified in the contract; that the trustees of the growers' company were empowered, by vote of defendants and others, to execute the formal contract; that such contract was made in writing and signed by one Alex Lindsay, agent of the Earl Fruit Company of the Northwest, and on behalf of plaintiff, the agent Lindsay announcing that the party purchasing the fruit was plaintiff, and that the contract was to be assigned to plaintiff by the Earl Fruit Company of the Northwest—which the amended complaint alleges was done—that defendants failed and refused to deliver their fruit to the plaintiff, but sold and delivered the same to another dealer; that defendants had produced and sold and delivered to the other dealer 1,763 boxes of winter apples; that the contract price thereof, under which they were contracted to be delivered to plaintiff, was \$1.40 per box, and that the market value thereof on October 15, 1919, the date when they were harvested, packed and ready for mar-

ket, and the date when they should have been delivered to plaintiff under the terms of the contract, was \$2.20 per box; that plaintiff suffered damages in the sum of \$1,410.40, being at the rate of 80c per box for 1,763 boxes.

There is also set out in full in the amended complaint a contract made and entered into between respondents and the Peach Fruit Growers' Company for the handling of respondents' fruit in the season in question. A paragraph of that contract is as follows:

"9. Whereas the Association must provide for the payment of certain overhead expenses and fixed charges and must expend such sums as are necessary to keep in touch with crop and market conditions and must provide warehouse and storage facilities in proportion to the tonnage contracted; and whereas such expenses should be pro-rated over all of the fruit contracted to be sold, the Grower, therefore, agrees that in the event he withholds his fruit or any part thereof in contravention of this agreement, he will pay to the Association for each package of fruit so withheld, as liquidated damages for such violation of his contract, the sum of three and one-half cents ($3\frac{1}{2}c$) for each box of apples or pears; three and one-half cents ($3\frac{1}{2}c$) for each crate of berries or cherries; one and three-quarter cents ($1\frac{3}{4}c$) for each crate or box of prunes or peaches, and for other varieties of fruit an amount in such proportion to above charge made for apples as the average market price of the fruit in question bears to the average price of apples during the season in which the violation occurred."

It was contended by respondents, upon demurrer, that, under the foregoing provisions, liquidated damages were stipulated between respondents and their own agent, the Peach Fruit Growers' Company, and that therewith appellant had no concern. The only argument of appellant in its opening brief is that, since the parties are competent to make the contract

Jan. 1922]

Opinion Per HOLCOMB, J.

in question and actually entered into it, appellant having fulfilled all the terms thereof which were its to perform, and respondents having defaulted, thereby causing damages to appellant as alleged, there is no rule of law by which respondents can be absolved from their obligations to pay the amount of such damage and loss. It is urged that the facts pleaded clearly established an ordinary contract of sale and failure to make delivery; that the measure of damages is clear and the facts are clear.

We are unable to see by what proposition of law appellant contends these private respondents are to be held for the contract liability of the Peach Fruit Growers' Company, which is alleged in the amended complaint to be a corporation organized and existing under the laws of the state of Washington.

A stockholder is, in law, a different person from a corporation, and his promise, if any, to become personally liable for the debts of the latter beyond the extent to which he stands liable under the law is a promise to answer for the debt, default or miscarriage of another, and hence is within the statute of frauds and not enforceable unless in writing. 10 Cyc. 650. The legal liability of these stockholders is only to the extent of their unpaid stock subscription for any debt or liability of the company, and there is no such fact alleged in the amended complaint.

It is urged by appellant that, since the only fruit to be sold was the fruit of individuals present and voting to sell the fruit at the time the contract that is sued upon in this case was invited, therefore the contract in question was the contract of the growers, although the form in which they were to contract was as set forth in the writing with the Peach Fruit Growers' Company. Cases are then cited to the effect that a

person who enters into a contract with another and causes it to be reduced to writing in the name of his agent, or under an assumed name or the name of another, may be identified by parol evidence as the real party in interest, and thus subjected to liability thereon. *Pleins v. Wachenheimer*, 108 Minn. 342, 122 N. W. 166, 133 Am. St. 451; *Great Lakes Towing Co. v. Mill Transportation Co.* (C. C. A.), 155 Fed. 11; *Karns v. Olney*, 80 Cal. 90, 22 Pac. 57, 13 Am. St. 101; *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165, 15 Am. St. 764; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 15 S. W. 417, 24 Am. St. 351, 12 L. R. A. 714; *Scanlan v. Grimmer*, 71 Minn. 351, 74 N. W. 146, 70 Am. St. 326; *Hartman v. Thompson*, 104 Md. 389, 65 Atl. 117, 118 Am. St. 422.

But this is not the case of an undisclosed principal, and is not a case of adoption of a business name or an assumed name or the name of another for the purpose of transacting business; but here the contract was reduced to writing and was made in the name of the Peach Fruit Growers' Company, Incorporated, as principal, and appellant reinforces the fact of the identity of the principal by attempting to show that respondents were stockholders present at the meeting which authorized the Fruit Growers' Company to enter into the contract, thereby showing that, if respondents were the principals, they were then disclosed and known to appellant.

In the case of *Great Lakes Towing Co. v. Mill Transportation Co.*, *supra*, the circuit court of appeals held that:

“If a principal not disclosed by a contract made by and in the name of his agent subsequently claims the benefit of it, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party.”

Jan. 1922]

Opinion Per HOLCOMB, J.

It must be admitted that there is a great contrariety of opinion among the courts upon this question. They were well weighed and analyzed in an opinion by the California supreme court in the case of *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65. The court in that case rejected the pronouncement of no less an authority than Judge Story [Story on Agency, § 160a], saying:

“The cases in which the question has arisen are those in which an agent has contracted in his own name, and his principal has afterwards sued or been sued on the contract, and Judge Story, in his work on Agency, section 160a, says that the doctrine maintained in the more recent authorities is, that ‘if the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it.’

“But an examination of the authorities cited in support of this statement shows that they do not support it, as has been frequently pointed out.

“It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract.

“For a full and able discussion of the whole subject see *Chandler v. Coe*, 54 N. H. 561, and *Gillig v. Road Co.*, 2 Nev. 216, and cases therein cited.

“Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parol. It is as important to know who has made a contract as to know its terms; and when the

parties put it in writing, there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door, in every case, to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge.”

And that, we think, is sound reasoning and the reasoning to be applied here. It is rested upon the only rule capable of general and steady application. If appellant knew, when the contract was entered into, as it alleges, that it was made for the benefit of third parties (the respondents), the contract should have been made so to show, which was not done. This conclusively indicates that the appellant or its assignor elected to look to the party named in the contract for the performance of the contract.

We are well satisfied that the demurrer was properly sustained, and the judgment of dismissal is affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

Jan. 1922]

Opinion Per HOLCOMB, J.

[No. 16576. Department Two. January 13, 1922.]

BARNETT BROTHERS, *Appellant*, v. J. F. LYNN *et al.*,
Respondents.¹

PRINCIPAL AND AGENT (52, 63)—UNDISCLOSED AGENCY—LIABILITY TO THIRD PERSONS—RATIFICATION OF ACTS OF AGENT—CONTRACTS OF SALE. Where a fruit grower's company makes a contract for the sale of the fruit raised by its individual stockholders, a stockholder, by taking advantage of the terms of the contract to dispose of his early and soft fruits to the buyer at a price higher than the market value, thereby ratifies and adopts the contract of the company calling for the delivery to the buyer of his crop of winter apples, and is liable in damages for a breach on his part.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered December 2, 1920, upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Lee & Kimball, for appellant.

Freece & Pettijohn, for respondents.

HOLCOMB, J.—This suit is upon the same contract alleged and set forth in the case of *Barnett Brothers v. Lynn*, ante p. 308, 203 Pac. 387, the same allegations being made in the amended complaint and the same issues involved upon demurrer, with these additional facts: Appellant alleges in its amended complaint that these defendants ratified and confirmed their contract for the sale and delivery of their fruit by the Peach Fruit Growers' Company, as made by them by and through their duly constituted representative and agent the Peach Fruit Growers' Company, by delivering to plaintiff the following quantities of their 1919 crop of fruit, to wit: 1,298 boxes of peaches at 60c, and 601 boxes of pears at \$1.25 per box; for which plaintiff paid to these defendants the prices

¹Reported in 203 Pac. 389.

specified in the contract for such fruit; that the prices were higher than the reasonable market value of the early and soft fruits of the season of 1919; and that one of the considerations for the making of the contract on the part of plaintiff and the paying of the prices named therein for such soft and early fruits was the special price made upon winter apples and winter pears, as specified in the contract; and that such special consideration was known to defendants and agreed to by them as a part of the terms of the contract.

It will thus be seen that there is the additional element of ratification and adoption of the contract on the part of these defendants which does not exist in the preceding case. Respondents claim that there could be no ratification of such contract because, as set forth in 31 Cyc. 1245:

“Ratification as used in the law of principal and agent may be defined as the adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract without authority to do so.”

It is urged that an examination of the contract in question shows that it was not entered into on behalf of defendants, nor did the Peach Fruit Growers' Company assume to represent defendants, and consequently there can be no ratification thereof. The text of 31 Cyc. 1251 is quoted as follows:

“In order that an unauthorized act may be capable of ratification it is necessary that it should have been performed by one acting as agent on behalf of another as principal. Hence if an alleged agent does not pretend or assume to be acting for another, but acts solely on his own account, then as to such other the transaction is *inter alios acta*, and he cannot make

Jan. 1922]

Opinion Per HOLCOMB, J.

himself a party to it by his ratification of the act; and even where one falsely professes to act as agent but is actually contracting for himself and in his own name, the alleged principal cannot make himself a party to the contract by ratification."

And the following cases are cited: *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *Backhaus v. Buells*, 43 Ore. 558, 73 Pac. 342; *Ilfeld v. Ziegler*, 40 Colo. 401, 91 Pac. 825; all to the effect in general that it is the law that there is no rule for the operation of the ratification by a principal of the unauthorized act of an agent unless the latter, at the time of the sale, avowedly acts as an agent. But we think there is sufficient alleged in the amended complaint, assuming that the sale was made directly by respondents to appellants, to bring this case within the rule announced by the circuit court of appeals in *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11, to the effect that if a principal, not disclosed by a contract made by and in the name of his agent, subsequently claims the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as the contracting party.

Respondents should not be permitted to avail themselves of the fruits of a part of the contract, as against appellant, and repudiate the remainder; it being alleged in the amended complaint against these defendants that they sold and delivered their peaches and pears at the contract prices, for which they were paid by appellant the prices specified in the contract, and that there was a special consideration for appellant to make the contract and pay the specified prices for such fruits, which was known to and agreed to by respondents as a part of the terms of the contract. The amended complaint stated a cause of action against

these defendants sufficient to put them upon their defense. The demurrer should have been overruled.

The judgment is reversed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16696. Department Two. January 14, 1922.]

J. W. ROBINSON, *Appellant*, v. PACIFIC TELEPHONE & TELEGRAPH COMPANY *et al.*, *Respondents*.¹

TELEGRAPHS AND TELEPHONES (5)—INADEQUATE SERVICE—ACTIONS—POWERS OF PUBLIC SERVICE COMMISSION. An action for damages grounded on the poor service rendered by a telephone company to a subscriber is not within the jurisdiction of the courts in the first instance, since under Rem. Code, § 8626, the remedy for unjust and unreasonable practices on the part of a public service corporation must be sought by application to the public service commission.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 19, 1921, upon sustaining a demurrer to the complaint, dismissing an action for damages. Affirmed.

Robinson, Murphy & Murphine, for appellant.

Chadwick, McMicken, Ramsey & Rupp, John P. Garvin, and *Stephen F. Chadwick*, for respondents.

PARKER, C. J.—The plaintiff, Robinson, a customer of the defendant telephone company, commenced this action in the superior court for King county, on February 7, 1919, seeking recovery of damages against the defendant, alleged to be the result of the violation of his rights in connection with the furnishing of telephone service to him. The defendant's demurrer to the complaint, including the supplemental complaint,

¹Reported in 203 Pac. 1.

Jan. 1922]

Opinion Per PARKER, C. J.

being sustained by the superior court, and the plaintiff electing to not plead further, final judgment of dismissal was rendered against him; from which he has appealed to this court.

Appellant's complaint is very long, and to us seems much involved in its language. We do not feel called upon to analyze it in detail here. We deem it sufficient to say that it contains four alleged causes of action, as follows: The first cause of action is a claim for damages as the alleged result of annoyance and inconvenience to appellant's office, in that his stenographer was compelled to repeatedly answer telephone calls at his office which were erroneously transmitted there by respondent's servants, to the extent that a considerable portion of his stenographer's time, taken from her other duties, was thus consumed, covering a period of seventy-eight weeks up to the time of the commencement of this action, to appellant's damage at the rate of \$12.50 per week for seventy-eight weeks, aggregating \$975. The second cause of action is a claim for repayment of the \$12.50 per month paid by appellant to respondent for telephone service for the period of thirteen months prior to the commencement of this action, aggregating \$162.50; this upon the theory that the service rendered was worthless, rendered so by the alleged annoyance noticed in the first cause of action. The third cause of action, which is a claim for injunctive relief, we think is so devoid of merit as to not call for consideration here; especially in view of subsequent events shown by the record, indicating plainly that there is no unlawful threat to remove appellant's telephone, against which alleged threat the injunctive relief is sought. The fourth cause of action, set up in a supplemental complaint filed on October 13, 1920—which, it will be noticed, was some twenty months after the commencement of the

action—is merely a claim for damages, continued and accumulated, under the same conditions as alleged in both the first and second causes of action, which damages, alleged to have occurred after the beginning of the action, are claimed in the amount of \$1,075. There is a stipulation made by counsel, filed in the case, which they agree shall be considered as a part of each of appellant's causes of action, to the effect that the charge made by respondent for telephone service rendered to appellant "has at all times been the tariff charge provided by the public service commission of the state of Washington."

Our conclusion is that this pleading of appellant's several causes of action amounts to nothing more or less than the seeking of damages as against respondent because of the inadequacy of the telephone service that it was required to render to appellant, covering a continuous period of approximately three years, without appellant having ever at any time made complaint or application to the public service commission of the state of Washington to have the defects or shortcomings of respondent's telephone service remedied by appropriate orders of that commission.

Being of the opinion that appellant's pleaded claims present, in their last analysis, only questions of alleged "unjust" and "unreasonable" practices on the part of respondent as against appellant, spreading continuously over such a long period of time, within the meaning of § 8626, Rem. Code, and it appearing that that and other sections of our public service law require that remedy for such wrongs be sought in the first instance through complaint and application to our public service commission, we conclude that appellant's complaint does not state facts entitling him to relief, as prayed for, at the hands of the courts. The reasoning of, and observations made in, our decisions in *State*

Jan. 1922]

Statement of Case.

ex rel. Goss v. Metaline Falls Light & Water Co., 80 Wash. 652, 141 Pac. 1142; *Hewitt Logging Co. v. Northern Pac. R. Co.*, 97 Wash. 597, 166 Pac. 1153; *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 Pac. 782; *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 172 Pac. 899; and *State ex rel. Home Tel. & Tel. Co. v. Superior Court*, 110 Wash. 396, 188 Pac. 404, lend support to this conclusion. We do not cite these cases as being exactly in point, and we do not lose sight of the fact that these cases deal, for the most part, with excessive and unreasonable charges for service. But we think the question of alleged unjust and unreasonable practices, under the circumstances here pleaded, is as completely within the exclusive original jurisdiction of the public service commission as are unreasonable and excessive charges.

The judgment is affirmed.

HOVEY, MAIN, HOLCOMB, and MACKINTOSH, JJ.,
concur.

[No. 16618. Department Two. January 17, 1922.]

UNION STATE BANK OF ODESSA, *Respondent*, v. LIZZIE
MILLER, *Appellant*.¹

APPEAL (263, 301)—RECORD—TRANSCRIPT—CERTIFICATE TO STATEMENT OF FACTS. Where there is nothing in the record on appeal except the clerk's transcript of the pleadings, and a statement of facts which is not certified by the trial judge, the judgment of the lower court, based upon issues of fact, will be affirmed.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered upon findings in favor of the plaintiff, in an action to subject real property to the lien of a judgment, tried to the court. Affirmed.

¹Reported in 203 Pac. 947.

Charles F. Bolin, for appellant.

Merritt, Lantry & Merritt, for respondent.

MAIN, J.—This action was brought for the purpose of subjecting certain real property to the lien of a judgment. The complaint in effect alleges that, prior to August 22, 1918, Conrad Miller and Lizzie Miller were husband and wife, and that on this date they were divorced. Prior to the divorce, a debt had been contracted to the plaintiff, Union State Bank of Odessa. The property which it is sought to subject to the lien of the judgment was owned by the parties prior to the divorce and was community property. In the divorce action the property was set over to Lizzie Miller as her separate property. Subsequent to the time when the decree of divorce was entered, the bank brought an action against Conrad Miller and obtained a judgment, and thereafter brought this action against Lizzie Miller for the purpose of enforcing the lien of the judgment against the property which had been set over to her in the divorce action, claiming that, since the debt was a community debt and the property was community property, such a right existed. The answer contains certain admissions and denials. The plaintiff had judgment, and the defendant appeals.

The respondent bank objects to the consideration of the case upon the merits because there is no record here which will present the questions which the appellant seeks to have determined. The clerk's transcript contains only the complaint and the answer. There has been filed with the clerk of this court what purports to be a statement of facts, but this is not certified by the trial judge. Upon this state of the record, the court has no alternative but to sustain the objection of the respondent to the consideration of the case upon

Jan. 1922]

Opinion Per BRIDGES, J.

the merits and affirm the judgment, and it will be so ordered.

Affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16716. Department One. January 19, 1922.]

R. MUSGRAVE *et al.*, Respondents, v. JAMES R.
ATKINSON *et al.*, Appellants.¹

AGRICULTURE (8) — LABOR LIENS — PRIORITIES — STATUTES — CONSTRUCTION. A farm laborer's lien on crops, as provided by Rem. Code, §§ 1188, 1189, is superior to a prior chattel mortgage on the same crops, where both claims have been filed in compliance with the statutes governing them; *Id.*, § 3660, giving priority to a duly executed and recorded chattel mortgage over subsequent incumbrances not applying in case of statutory liens.

Appeal from a judgment of the superior court for Yakima county, Webster, J., entered July 6, 1921, in favor of the plaintiffs, in an action to determine the prior rights of lien claimants, tried to the court. Affirmed.

Grady, Shumate & Velikanje, for appellants.

Heman D. Hunt, for respondents.

BRIDGES, J.—Is a farm laborer's lien superior to the lien of a chattel mortgage, when both comply with statutes governing them and cover the same crop, and the mortgage is prior to the lien in point of time of execution and filing?

This is the only question involved here. The trial court answered in the affirmative, and this appeal results.

¹Reported in 203 Pac. 973.

Sections 1188 and 1189, Rem. Code (P. C. §§ 9666, 9667), provide for a farm laborer's lien on crops, and make it a "preferred lien" and "prior to all other liens and incumbrances." Prior to 1915, the statute with reference to chattel mortgages read as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property." (Sec. 3660, Rem. & Bal. Code.)

In 1915, the legislature amended this section to read as follows:

"A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed within 10 days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law." (Rem. Code, § 3660; P. C. § 9747.)

Appellants assert that the act, as amended, has the effect of making a chattel mortgage, when executed and filed as provided by the statute, superior to any laborer's liens which may thereafter be filed against the property covered by the mortgage.

The case of *Sitton v. Dubois*, 14 Wash. 624, 45 Pac. 303, involved the identical facts we have here, but was decided under the chattel mortgage statute as it existed prior to the 1915 amendment. In that case there

Jan. 1922]

Opinion Per BRIDGES, J.

was a duly executed and filed chattel mortgage, which was prior in point of time to a farm laborer's lien on the crops covered by the mortgage. We held that the lien of the laborer was prior and senior to the mortgage. What words, then, are there in the statute, as amended, which can have the effect contended for by the appellants and make the *Dubois* case no longer the law of this state? The old statute made the mortgage void as against "creditors of the mortgagor or subsequent purchasers and encumbrancers", unless certain designated things be done. The act, as amended, provides that a mortgage is void, as against creditors of the mortgagor, "*both existing or subsequent, whether or not they have or claim a lien upon such property,*" and against "all subsequent purchasers, *pledgees, mortgagees* and encumbrancers", unless the statute with reference to filing, etc., be complied with. The material changes made by the amendment, so far as concerns this case, are indicated by the words quoted and put in italics.

Let us first consider that portion of the statute, as amended, which speaks of creditors having subsequent liens. We are confident that the kind of lien intended by the legislature was one by judgment, garnishment, attachment and the like, and not a statutory lien such as is involved here. In construing statutes we must always look to the purpose and intent of the legislature. We do not have to go far to see why the legislature inserted in the act which it was amending the provision with reference to all creditors, existing and subsequent, whether they have liens or not. In the case of *Pacific Coast Biscuit Co. v. Perry*, 77 Wash. 352, 137 Pac. 483, we held that, under the old statute, a mortgage was good as against all creditors who did not have liens, even though it was not executed and

filed as provided by the statute. This case was decided shortly before the meeting of the 1915 legislature. See, also, the case of *Heal v. Evans Creek Coal etc. Co.*, 71 Wash. 225, 128 Pac. 211. It is plain that the legislature was not satisfied with the result which would flow from the decisions of this court on that question, and that the chief purpose of amendment of the old chattel mortgage statute was to avoid such consequences.

Let us now consider that portion of the statute, as amended, which has reference to subsequent "pledgees, and mortgagees and encumbrancers . . .". The appellants argue that, in any event, the respondents' lien is a subsequent incumbrance, consequently, is expressly within the statute. The old statute spoke only of "encumbrancers", and the amendment added "pledgees and mortgagees", but the adding of these words could not have the effect contemplated by appellants. The word "encumbrancers" includes the other words, and therefore, in this regard, the amended act is not broader than the old act, and it was under the old act, in the *Dubois* case, *supra*, we held the laborer's lien superior to a chattel mortgage prior in point of time.

When the legislature was considering and passing this amendment it knew that the farm laborer's lien statute expressly provided that such liens should be preferred and prior to everything, and it must also have known that this court, long before this amendment, had expressly held that, under the statute which was being amended, the laborer's lien was superior to a prior chattel mortgage. If, therefore, the legislature, when making the amendment, intended to make such radical changes in the law of the state as to make a laborer's lien junior to a prior mortgage, it would seem that it would have expressly said so, and would

Jan. 1922]

Opinion Per FULLERTON, J.

not have left the matter in such uncertain language as is found in the statute.

The judgment is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16523. Department One. January 19, 1922.]

HOMER HARRIS *et al.*, Respondents, v. THE CITY OF SEATTLE, Appellant.¹

STREET RAILROADS (20)—ACCIDENTS AT CROSSINGS—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of an automobile truck approaching a street car crossing is guilty of such contributory negligence as to bar recovery for injuries to his truck and person resulting from a collision with the street car, where he looks in the direction of an approaching street car before he reaches the cross-street and, seeing no car because of intervening bill boards, drives straight ahead at twelve to fifteen miles per hour, and does not look again until within about thirteen feet of the car line, when it is too late to stop his car.

Appeal from a judgment of the superior court for King county, Jurey, J., entered January 7, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for injuries sustained in a collision between an automobile and a street car. Reversed.

Walter F. Meier and *Ewing D. Colvin*, for appellant.
Beeler & Sullivan, for respondents.

FULLERTON, J.—This action grows out of a collision between a Ford automobile truck owned and driven by the respondent, and a street car owned and operated by the appellant, city of Seattle. The collision occurred at the junction of East Union street and Nineteenth avenue, both public streets of the appellant city.

¹Reported in 203 Pac. 943.

Union street extends east and west from the point of junction, and Nineteenth avenue north and south therefrom. Nineteenth avenue is comparatively level. Between Eighteenth avenue, the next street to the west, and Nineteenth avenue there is a down grade of thirteen and one-half per cent. Both streets are paved, and on Union street there is a double street car track. The street junction is in quite a thickly settled residence district, and, in addition to the dwelling houses erected on the bordering lots, there is a high billboard, constructed on the property line, and extending for a considerable distance back each way from the southwest corner of the street junction, which obstructs the view of Union street from any one approaching on Nineteenth avenue from the north, and the view of Nineteenth avenue from any one approaching on Union street from the west. The street car with which the automobile collided was traveling eastward on the south track of the railway line. The respondent approached from the north. The place in the street where the collision occurred is a matter of dispute in the evidence; but accepting as true the respondent's version, it occurred on the west side of Nineteenth avenue, the side of the approach of the street car, at about the point of junction of Union street therewith. The collision injured the respondent's truck, and caused serious injuries to his person. In this action he recovered in the court below, and the city appeals from the judgment entered against it.

The respondent's version of the surrounding conditions and of the manner in which the accident happened is the version, of course, that the jury had the right to believe. His story is in substance this: As he approached Union street, the scene of the accident, he was traveling at a speed of about twelve miles an hour—at no time exceeding fifteen miles per hour. On

Jan. 1922]

Opinion Per FULLERTON, J.

nearing the street intersection, but before he had reached it, he looked to the right up Union street as far as the billboards hereinbefore mentioned permitted him to see, and saw no street car or other traffic approaching from that direction. At that time of the day—8:10 a.m.—the principal traffic on Union street was towards the city—the west. After looking to the right, the respondent looked to the left, and while he saw a number of automobiles approaching, saw none which would interfere with his crossing, and entered the street without slackening his speed. He did not look to the right on entering the street, at which place the entire street for a distance of more than three hundred feet was open to his vision, nor did he look until he reached a point some thirteen feet from the north rail of the east-bound car track. He then looked and saw a street car approaching from the west, the exact distance of which he was unable to do more than merely approximate; that he did not slacken his speed, nor change his course, but continued on in the direction of the tracks, and was struck by the street car mentioned, about the time the front wheels of his truck got between the rails of the track on which the street car was running. The respondent testified further that, at the time he saw the street car, he was too close to its track to stop his truck at the speed it was going before he reached the track. More particularly, he said that the automobile could not have been stopped at less than fifteen feet, while the distance from the car track was but thirteen feet. The street car, of course, had some overhang, and it is probable that he was less than eleven feet from the zone of danger when he first looked for an approaching car from any point where the car would be within his range of vision.

There was evidence, negative in its nature, tending to show that the street car gong was not sounded, and

evidence also, independent of the respondent's testimony, that it was traveling at a speed in excess of the limit fixed by the city ordinances, and evidence tending to show that the motorman operating the street car was, just prior to the collision, inattentive to his duties—evidence from which the jury was warranted in finding that the operators of the street car were negligent.

The question then is, was the respondent guilty of such contributory negligence as to preclude a recovery? It is our conclusion that he was. A driver of an automobile on approaching a street car track for the purpose of crossing must make a reasonable use of his senses to guard his own safety, and a failure so to do is negligence. *Bowden v. Walla Walla Valley R. Co.*, 79 Wash. 184, 140 Pac. 549.

“A driver of an automobile may not deliberately drive upon the street car track which is open and apparent, and excuse himself by saying that he looked and did not see that which no one could avoid seeing if he had looked; or that he was giving his attention to his machine, when common prudence demanded that he give some part of his attention to his own safety.” *Herrett v. Puget Sound T., L. & P. Co.*, 103 Wash. 101, 173 Pac. 1024.

In this instance the respondent has not the excuse of looking and failing to see. As said by his learned counsel:

“The undisputed evidence is that the respondent *as he approached, but before he arrived at the property line*, looked to the right, that is, westward up East Union street. He did not see the car on East Union at that time. It (the car) undoubtedly was at some point on East Union east of Eighteenth avenue and west of the alley, so that he could not see the street car at that moment because the billboards on the northwest corner obstructed his view. Had he been on the property line he could have seen the street clear up to Eighteenth avenue, *but he was not on the property line. He was*

Jan. 1922]

Syllabus.

approaching the property line when he first looked.”
(The italics are counsel’s.)

The evidence also clearly shows that he did not again look for an approaching car until he had reached the zone of danger, too late to avoid a collision with the approaching car.

If a driver of an automobile may not excuse himself from a charge of negligence by saying he looked and did not see that which no one could avoid seeing had he looked, manifestly he is equally guilty of negligence if he does not look at all, or what is the same thing, looks from a place where an obstruction prevents him from seeing.

The judgment is reversed, and remanded with instructions to dismiss the action.

MITCHELL, BRIDGES, and TOLMAN, JJ., concur.

[No. 16715. Department Two. January 19, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. ED ASPELIN,
Appellant.¹

INSURRECTION—CRIMINAL SYNDICALISM—EVIDENCE—MEMBERSHIP IN I. W. W. The act of a member of the Industrial Workers of the World in inciting others to join the organization is in the nature of giving aid to such organization, within the prohibition of Laws 1919, p. 518, against criminal syndicalism.

SAME—INSTRUCTIONS — SEDITION—DEFINITION. In a prosecution for criminal syndicalism based on the act of defendant in inciting others to join the Industrial Workers of the World, it was prejudicial error for the court to charge the jury that “the term ‘sedition’ means to speak or to write against the character and constitution of the government or to seek to change it by any means except those prescribed by law;” in view of the fact that the offense of sedition under the syndicalism statute does not include theoretical discussion.

¹Reported in 203 Pac. 964.

Appeal from a judgment of the superior court for Jefferson county, Ralston, J., entered February 27, 1920, upon a trial and conviction of the crime of criminal syndicalism. Reversed.

George F. Vanderveer, Ralph S. Pierce, and Leslie B. Sulgrove, for appellant.

Tom W. Holman, for respondent.

HOVEY, J.—Appellant was convicted and sentenced for the crime of criminal syndicalism, under an information the charging part of which is as follows:

“That he, the said Ed Aspelin, in the county of Jefferson, state of Washington, on or about October 23rd, A. D. 1919, then and there being, and then and there being a member of the Industrial Workers of the World—commonly known as the ‘I. W. W.’—did then and there wilfully, unlawfully and feloniously give aid to the said Industrial Workers of the World, which was then a group of persons formed to advocate, advise and teach crime, sedition, intimidation, violence and injury as a means and way of effecting an industrial, economic, social and political change, by then and there soliciting one Frank Taylor and one Matt McDonald then to secure cards of membership in, to join, to become members of and to espouse the aim, purpose and object of said Industrial Workers of the World, then so a group of persons formed to advocate, advise and teach crime, sedition, intimidation, violence and injury as a means and way of effecting an industrial, economic, social and political change.”

The briefs were prepared before the various decisions of this court upon cases involving this statute and most of the questions raised have been disposed of by the case of *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211.

There was evidence introduced from which the jury was justified in finding that the organization known as the I. W. W. comes within the prohibition of the Laws

Jan. 1922]

Opinion Per HOVER, J.

of 1919, p. 518, the defendant was a member of the organization and one of its active exponents, being termed an organizer, and at the time alleged he approached a group of laboring men, including the men mentioned in the information, who were engaged in playing cards, and asked if any one cared to take out a red card. He did not get any encouragement when he first addressed them but returned a little later and again said: "Is there any body that wants to line up tonight," whereupon one of the men at the table said that he would take out a card tomorrow. The evidence further showed that both statements of the defendant were intended to mean and were understood to mean by the men addressed that they were invited to join and become members of the I. W. W.

One new question now presented is whether the acts alleged and proved constitute a violation of the statute. It is argued in the brief of the appellant that these acts merely showed an intent to commit a crime inasmuch as they were not successful in the result intended, and upon first impression the argument has some plausibility. We are satisfied, however, that they are something more than an attempt. This crime is largely made up of the circulation of ideas which have for their natural result the leading of men into committing acts of violence against persons and property. The basic principle is the entire overthrow of the existing order of things, and the literature shows quite clearly that, in the obtaining of this result, all restraints are to be abandoned. The use of the political methods afforded by law are expressly discountenanced as being inefficient, and what is called direct action is made a cardinal principle. In passing this act, the legislature evidently deemed it necessary to put a stop to activities which would naturally result in crimes

against persons and property, and made the mere membership in such an organization a crime. As charged and proven to the satisfaction of the jury, the defendant was such a member; and while that is not the crime of which he was convicted, yet his status as such would make any act of his, in inciting others to join, have the nature of giving aid to the organization.

Another point raised is the claimed error in giving the following instruction:

“The term ‘sedition’ means to speak or to write against the character and constitution of the government or to seek to change it by any means except those prescribed by law.”

The trial court was probably lead to adopt it by reason of the fact that it occurs under the title “sedition” in several compilations as the law of England. The citation supporting the statement in these works is *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. 624. This was a contempt proceeding and, in the course of the recital of a good deal of history, the statement was made that this was the law of England but the English rule is stated as:

“The only offense of this general character which is known to our law is attempt, ‘by word, deed, or writing, to promote public disorder, or to induce riot, rebellion, or civil war, which acts are still considered seditions and may, by overt acts, be treason.’ ”

The authority cited is Odgers, Libel and Slander, p. 419. That author shows that acts were considered to be sedition under the earlier cases which would not be sufficient to constitute the crime under the more modern law, and uses in that connection the following language:

“But mere theoretical discussions of abstract questions of political science, comparisons of various forms and systems of government, and controversies as to details of our own constitutional law are clearly permissible.”

Jan. 1922]

Opinion Per HOVEY, J.

There does not seem to be any American case on prosecution for sedition. The definitions given in our books of reference all embrace the ingredient of active wrong-doing, such as:

“A factious commotion in a state; the stirring up of such a commotion; incitement of discontent against government and disturbance of public tranquillity, as by inflammatory speeches or writings, or acts or language tending to breach of public order.”—Century Dictionary.

The accompanying words in our statute, “crime, violence, intimidation or injury”, show sedition is there used as meaning something more than theoretical discussion which would be sufficient under the instruction.

We think it would be going altogether too far to say that any one who would write a letter advocating a change in our constitution would be guilty of crime, unless it was accompanied by matter which incited violence or some act of a criminal nature. This instruction is not helped by any of the other instructions given, and we cannot say that it was not prejudicial to the defendant. We therefore find it necessary to reverse the judgment on this ground.

There are other errors alleged, but in view of our decisions in other cases under this act, these questions will probably not arise upon another trial.

The judgment appealed from is reversed and a new trial ordered.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ.,
concur.

[No. 16686. Department Two. January 19, 1922.]

S. C. BROWN, *Plaintiff*, v. WILCOX LUMBER & LOGGING
COMPANY, *Defendant*.

WM. H. PRATT, *as Receiver of Wilcox Lumber &
Logging Company, Appellant*, v. W. A.
WILCOX, *Respondent*.¹

CORPORATIONS (227) — INSOLVENCY — CLAIMS AGAINST RECEIVER —
PRESENTATION. Where a director and manager performs services for
his corporation clearly outside his duties as such officer on the
understanding with the other corporate officers that he is to be
compensated therefor, he has a valid claim against the corporation
for such services.

SAME (227)—RECEIVERS (66)—PREFERRED CLAIMS—NECESSITY OF
PRESENTING. Under Rem. Code, § 1153, providing that, in receiver-
ship proceedings, all claims for which a lien could be filed shall have
preference over other claims, the inchoate right of lien existing at
the time a receiver is appointed matures at once without the neces-
sity of the filing of the lien claim.

Appeal from a judgment of the superior court for
Pierce county, Clifford, J., entered May 7, 1921, allow-
ing a claim against a receiver, after a hearing before
the court. Affirmed.

Wm. H. Pratt, for appellant.

Charles Bedford, for respondent.

MAIN, J.—This is an appeal from an order allowing
the claim of one W. A. Wilcox against the receiver of
the Wilcox Lumber and Logging Company, an insolv-
ent corporation. The insolvent company was organ-
ized for the purpose of engaging in the logging and
saw-mill business. Soon after the completion of the
mill, it was destroyed by fire. In November, 1919, the
corporation being then insolvent, a receiver was ap-
pointed. In the course of administration, both general

¹Reported in 203 Pac. 949.

Jan. 1922]

Opinion Per MAIN, J.

and preferred claims were allowed. During the year 1920, sufficient of the assets were converted into cash to enable the appellant as receiver to pay the preferred claims in full, and subsequently a dividend of twenty-five per cent was paid on general claims. On February 12, 1921, the respondent Wilcox filed with the receiver the verified claim for labor for \$250 a month for the time commencing with April, 1919 and ending with October of that year, asking that it be allowed as a preferred claim. The receiver rejected the claim, both as a preferred and as a general claim, and later a hearing was had before the superior court and the claim was allowed as one preferred. From this order, the receiver appeals and makes two principal contentions:

First, that the trial court erred in allowing the claim at all; and second, that, if allowed, it should be only a general and not a preferred claim. The first objection to the allowance of the claim is that, at the time the services for which it was made were alleged to have been performed, the respondent was president and the managing officer of the corporation, and that he did not do anything which was clearly outside his ordinary duties as a director and manager. Before the claim of the director can be allowed against the assets of an insolvent corporation which is in the hands of a receiver, it must be established by a clear preponderance of the evidence, first, that the services were clearly outside of the ordinary duties as director; and, second, that they were performed under circumstances sufficient to show that it was well understood by the corporate officers as well as himself that the services were to be paid for by the corporation. *Burns v. Commencement Bay Land etc. Co.*, 4 Wash. 558, 30 Pac. 668, 709; *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157. Recourse must, therefore, be had to the rec-

ord to determine whether the respondent has brought himself within the rule stated. The evidence shows, referring to the matter of compensation of the directors, the following:

“A. No, none of us; for actual services, and my services,—I did not confine my services as a director or as manager; wherever I saw I was needed,—I kept the books and did the business, rustling logs and helping raft logs, or build roads or anything. Q. You worked just as any other man? A. Yes, sir.”

This evidence shows that the services rendered by the respondent were clearly outside of his ordinary duties as director and manager. It was no part of his duty as manager and director to engage in “rustling logs and helping raft logs and build roads or anything.” As to whether it was understood by the corporate officers that compensation was to be allowed, the evidence shows that no salaries were to be allowed or drawn until the mill was completed; but that, after this, the officers doing work which was clearly outside the other duties as such officers were to be compensated at the usual and ordinary rate for such services. Upon this branch of the case, it must be held that the respondent was entitled to a claim.

The next question is whether that claim was properly allowed by the trial court as one preferred. It is asserted by the appellant, and admitted by the respondent, that, if the claim is entitled to a preferred rank, it must be one for which the lien could have been claimed. No claim of lien was filed, but it is the position of the respondent that, when the receiver was appointed, the inchoate right of lien which existed at that time was matured. Section 1153 of Remington’s 1915 Code (P. C. § 9741), provides that:

“Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall

Jan. 1922]

Opinion Per MAIN, J.

require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims, other than operating expenses.”

This is one of the sections of the chapter entitled “liens of employees.” In *Olsen v. Smith*, 84 Wash. 228, 146 Pac. 572, with reference to this statute it was held that a laborer’s lien would be “matured by the property owner’s assignment or passage into the receivership within that period (ninety days), [and] is entitled to preference over the lien of the mortgage.” The case of *Brown v. Hunt & Mottet Co.*, 111 Wash. 564, 191 Pac. 860, is not in point because the court was there considering a section of chapter 3 of title VIII of Remington’s 1915 Code which had to do with the liens of materialmen. In that chapter there is no provision such as that above quoted which provides that, on the appointment of a receiver, all claims for which a lien “could be filed” shall be paid before other debts or claims other than operating expenses. It is argued, however, that the liens referred to in the statute as those which could be filed are those which could have been filed at the time the claim was presented to the receiver; but we think this is not the correct construction. The language of the statute undoubtedly refers to liens which were capable of being filed had the claimant elected to do so within the time allowed by statute. The claim of the respondent, being one for which he could have filed a lien, became a preferred claim upon the appointment of the receiver.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, and HOVEY, JJ., concur.

[No. 16727. Department Two. January 19, 1922.]

WESTERN WALL BOARD COMPANY, *Respondent*, v. THE
CITY OF SEATTLE, *Appellant*.¹

MUNICIPAL CORPORATIONS (566)—CLAIMS—STATUTORY RESIDENCE OF CLAIMANT—CORPORATIONS. Rem. Code, § 7995, requiring a claimant for damages against a city to include in the claim "a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued" is inapplicable to corporations, inasmuch as they have no actual residence within the term as used in the statute.

TRIAL (101)—INSTRUCTIONS ALREADY GIVEN. The refusal of requested instructions is not error where their subject-matter is covered by the instructions given.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 17, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover damages to property from flooding. Affirmed.

Walter F. Meier, Charles T. Donworth, and Frank M. Preston, for appellant.

Bausman, Oldham, Bullitt & Eggerman, for respondent.

MAIN, J.—The purpose of this action was to recover damage to property caused by flooding, which it is claimed was due to the negligence of the defendant city. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$328.13. Motions for judgment notwithstanding the verdict and for new trial being made and overruled, judgment was entered upon the verdict, from which the defendant appeals.

The respondent is a corporation owning and operating a wall board factory, on Ninth Avenue South, in

¹Reported in 203 Pac. 944.

Jan. 1922]

Opinion Per MAIN, J.

Seattle, opposite the intersection of that street with a street called Snoqualmie Place. Ninth Avenue South runs in a northerly and southerly direction immediately east of respondent's plant, and Snoqualmie Place begins at Ninth Avenue opposite respondent's property and runs in a northeasterly direction. To the east is a ravine through which a natural stream flows all the year around. The ground starts to rise from Ninth Avenue South in an easterly direction until a steep hillside is reached at the head of the ravine. The stream in question has for many years been subject to floods at times of heavy rain. The appellant built a twelve by sixteen inch box draw, or flume, to carry the waters of this stream from the point on Snoqualmie Place approximately one hundred and forty feet from the easterly margin of Ninth Avenue South to a seventeen by twenty-four inch wooden culvert twenty-seven feet long built by it under Ninth Avenue South. The respondent formerly carried the water coming through this culvert across its property from its easterly margin line in an open wooden flume one hundred feet long to the westerly margin of its property, where it was discharged into a culvert. Sometime prior to the flooding, the respondent substituted for the wooden flume a twelve inch concrete pipe. The factory site across which this pipe runs is almost flat. The pipe constructed by the respondent was of the same inside dimensions as the outlet constructed by the appellant into which it emptied.

On March 13, 1920, after heavy rain, respondent's plant was flooded, causing the damage complained of. The Ninth Avenue culvert had become clogged with debris such as tin cans, broken crockery, sticks and so forth. At the trial, the respondent contended that the appellant had been guilty of negligence in not keeping its flume and culvert free from gravel and debris. The

appellant contended that the respondent was guilty of contributory negligence in the manner in which it had constructed its concrete pipe across its property. Upon the issues of negligence of the appellant and the contributory negligence of the respondent, the cause was submitted to the jury, with the result as above indicated.

The first, and it seems to us the primary question, is whether the claim filed by the respondent meets the requirements of the statute. This claim, among other things, recited that:

“The claimant is a corporation duly organized under the laws of the state of Washington, having paid all license fees and taxes, as required by law, and is engaged at 4527 Ninth Avenue South, Seattle, Washington, in the manufacture and sale of Perfection wall board, Pioneer plaster board, and Pioneer hollow blocks and partition blocks; and is the owner of Lots 1, 2, 3, 4, 5 and 6, Block 10; Lots 7 and 8, Block 7, all in Ladd's First Addition to South Seattle, Washington.”

It will be noticed that it is recited that the claimant is engaged at 4527 Ninth Avenue South in the manufacture and sale of Perfection wall board, and so forth. The claim does not recite any residence of the corporation for a period of six months immediately prior to the time the claim for damages accrued. The statute, Rem. Code (1915), § 7995 (P. C. § 703), among other things, provides that a claim for damages sounding in tort against any city of the first class shall contain “a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued.” It thus appears that, if, under the statute, it is necessary in the claim to recite an actual residence of the corporation for six months prior to the time such claim for damages accrued, the claim in question is defective. It will be admitted that the statute

Jan. 1922]

Opinion Per MAIN, J.

covering the essentials of the claim is mandatory and that, if it is necessary to recite an actual residence for a corporation for six months immediately prior to the time the claim accrued, the present claim is fatally defective.

The question then is whether the six months' provision of the statute is applicable to the corporation claimants. The requirement is that the actual residence of the claimant be stated. A corporation has no actual residence as the term is used in the statute and it has been held that a statute requiring a claimant to state a residence is not applicable to corporations. *Hall Co. v. Jersey City*, 62 N. J. Eq. 489, 50 Atl. 603; *National Fire Proofing Co. v. Daly*, 76 N. J. Eq. 35, 74 Atl. 152. It is argued, however, that, even though a corporation has no residence in the sense that an individual has, the claim should have recited as its residence the place at which it had been engaged in business for six months prior to the time when the claim for damages accrued. To so hold would be to give the statute a strained construction and read into it something which the language used does not import. A corporation is not deemed a "resident" if the terms or spirit of the statute employing the term render it inapplicable to corporations. *Fletcher Cyc. of Corporations*, Vol. 1, § 55; *People v. Schoonmaker*, 63 Barb. (N. Y.) 44. The obvious purpose of the statutory requirement of six months' residence was to insure such notice as would enable the city through proper officers to investigate the individual making the claim, the cause and character of the injury, while the facts were comparatively recent, and thus protect itself against itinerant claimants and fraudulent claims. For this purpose, as applied to the individual, the six months' requirement was an aid to the city. The claim was not defective in that it failed

to recite an actual residence of the respondent for six months prior to the time the claim for damages accrued.

The second contention is that the respondent in the manner in which it constructed the drain across its property was guilty of contributory negligence as a matter of law. Upon this question the evidence was in dispute and presented a question for the jury. To hold as a matter of law that the respondent was guilty of contributory negligence would be to disregard the evidence in its behalf to the effect that the drain was properly constructed in view of the attendant conditions.

There is a further contention based upon the refusal of the trial court to give certain requested instructions. In the instructions given the issues presented upon the trial were fully covered and it was not error to refuse to give those requested. Some of the requested instructions, if given, would have been out of harmony with the views expressed in this opinion with reference to the essentials of the claim; it would have been error to have given them.

The judgment will be affirmed.

PARKER, C. J., MACKINTOSH, and HOVEY, JJ., concur.

Jan. 1922]

Opinion Per PARKER, C. J.

[No. 16548. Department One. January 19, 1922.]

E. V. WYANT, *Respondent*, v. INDEPENDENT ASPHALT
PAVING COMPANY, *Appellant*, COUNTY COMMISSIONERS
OF YAKIMA COUNTY, *Respondents*.¹

COUNTIES (43)—CONTRACTS—PROPOSALS OR BIDS—NOTICE—SUFFICIENCY. Under Rem. Code, § 5755, requiring that notice of a call for bids for highway improvement "shall be published for at least two consecutive weeks previous to the date of letting" the contract, means that there shall be two full weeks' notice between first publication and time of letting the contract.

JUDGMENTS (171) — OPERATION AND EFFECT — RECITALS AS TO SERVICES. The recital of the record of the board of county commissioners upon the letting of a public contract that "due notice of same has been given," is *prima facie*, but not conclusive, evidence of sufficiency of statutory publication, and is rebuttable by evidence.

COUNTIES (43)—CONTRACTS—PROPOSALS FOR BIDS—NOTICE. Rem. Code, § 5755, providing that notice of the letting of a highway improvement contract shall be published for at least two consecutive weeks previous to the date of letting, cannot be construed as directory with respect to such two weeks' publication, because of the fact the statute further adds, "and in such other manner as the board may see fit to direct."

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered April 18, 1921, upon an agreed statement of facts, in an action for an injunction. Affirmed.

Roberts & Skeel and *J. J. Geary*, for appellant.

Sidney Livesey and *Richards, Fontaine & Gilbert*, for respondents.

PARKER, C. J.—This action was commenced in the superior court for Yakima county by the plaintiff, Wyant, seeking the enjoining of the defendant paving company and the county commissioners of that county from proceeding with the construction work and the

¹Reported in 203 Pac. 961.

incurring of indebtedness under a contract between the commissioners and the paving company for the construction of a paved highway by the latter, in local improvement district No. 16, of that county. The plaintiff, being the owner of lands sought to be charged by special assessment to aid in paying for the proposed improvement, seeks such injunctive relief upon the theory that the contract was unlawfully entered into between the commissioners and the paving company, in that the notice inviting bids therefor was not published for the period required by law prior to the awarding of the contract.

The commissioners, having been advised, a short time after the awarding and entering into of the contract, that it was unlawfully made because of insufficient publication of notice inviting bids therefor, answered, admitting the facts as plead by the plaintiff, and prayed for the annulling of the contract and the enjoining of the prosecution of work thereunder by the paving company, in substance as prayed for by the plaintiff. The paving company filed its answer and cross-complaint, wherein, by denials and affirmative allegations as against both the plaintiff and the commissioners, it seeks to have the contract adjudged to be a legal and binding one, and also seeks injunctive relief as against the commissioners to prevent their interference with the prosecution of the work. The case was submitted to the superior court upon an agreed statement of facts, and resulted in a judgment as prayed for by the plaintiff and the commissioners; from which judgment the paving company has appealed to this court.

The controlling facts may be summarized as follows: On January 24, 1921, after proceedings duly had resulting in the creation of the local improvement district, the commissioners duly passed a resolution in substance that sealed bids for the construction of the pro-

Jan. 1922]

Opinion Per PARKER, C. J.

posed improvement within the district, in accordance with plans and specifications theretofore prepared, would be received at their office in the court house "up to the hour of 2 p. m. on the 7th day of February, 1921," and directed the county auditor to publish "due and legal notice" thereof accordingly.

"Pursuant to said resolution, the county auditor caused to be published in the Yakima Morning Herald notice that on Monday, February 7, 1921, at the hour of 2 p. m., bids would be received in accordance with said resolution; . . . the first publication of said notice was made on January 25, 1921, and the second publication of said notice was made on February 1, 1921, and no other publication of said notice was made or had; . . ."

On February 7, 1921, the commissioners met at their office in pursuance of their resolution and the notice of the county auditor, duly published as they then supposed; and received bids for the construction of the improvement. Several bids were then received, opened and considered by the commissioners. One of the bids was that of the paving company; which bid, being the lowest, was accepted and approved as such by the commissioners, and the contract was then awarded to the paving company accordingly. In the record of the commissioners' action in that behalf, they recited that, "it appearing further that due notice of same has been given"—referring to the publication of the notice, by the county auditor, of the time and place of receiving bids.

Thereafter on February 11, 1921, the commissioners entered into a formal written contract with the paving company for the construction by it of the improvement. Thereafter a surety bond was furnished by the paving company as provided by the contract, which bond was approved by the commissioners. A short time thereafter, the paving company commenced work upon the

improvement. The paving company paid the premium necessary to procure its surety bond and incurred other expenses in connection with the improvement. The record, however, is silent as to the amount of expense incurred by the paving company in procuring its surety bond, or otherwise, in connection with the contract, prior to the commissioners' notifying the paving company that they had been advised by the prosecuting attorney of Yakima county of the illegality of the contract because of the insufficiency, as to time, of the publication of the auditor's notice inviting bids for the construction of the improvement. It seems certain, however, that comparatively very little had been done by the paving company in the incurring of expense by it, prior to such notice, which would result in ultimate loss to it. Thereafter the commissioners adopted and made a resolution and order canceling the contract and providing for the inviting of new bids for the construction of the improvement. This action was commenced in the superior court on March 12, 1921, which, it will be noticed, was only one month after the making of the contract, and, we may add, as we think the record shows, before the paving company had done anything looking to the prosecution of the work that would ultimately result in other than a small loss to it.

This local improvement district was created and the proposed improvement therein is to be constructed under our law relating to the improvement of roads at the expense of property benefited; so we are to look to that law for the authority of the county commissioners in the inviting of bids and the awarding of contracts for the construction of such improvements. It is therein provided that bids for the construction of such improvements shall be invited by the commissioners by causing the county auditor to publish a notice therefor and that—

Jan. 1922]

Opinion Per PARKER, C. J.

“The notice shall be published for at least two consecutive weeks previous to the date of letting, in one or more daily or weekly papers published and of general circulation in the county, and in such other manner as the board may see fit to direct.” (§ 5755, Rem. Code.)

We have seen that the notice given by the county auditor was published on January 25 and February 1, that “no other publication of said notice was made or had,” and that bids were to be, and were, considered, and the contract actually awarded, on February 7. So it is at once apparent that the notice was not published for a period of two weeks previous to the date noticed for the letting of the contract, and the date on which the contract was actually let and awarded by the commissioners to the paving company. In other words, the period of publication was in no event for more than thirteen days, computing the period by the exclusion of the first day of publication and including the day of the awarding of the contract; putting aside in our present inquiry the question of whether or not the two publications were sufficient, as to number of publications.

Counsel for the paving company argue that the use of the words “two consecutive weeks,” in the above quoted portion of the law, means that two publications, a week apart, and the letting of the contract immediately following the last of two such publications, satisfies the law. We have at least two decisions of this court which we think hold to the contrary touching a statute which reads almost literally, and which we regard as meaning exactly the same as this law, in so far as we are here concerned with their meaning. In *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099, there was involved the validity of a sale of real estate by administrators under our probate statute, which required personal service of an order to show cause, or that such

order "shall be published at least four successive weeks in such newspaper as the court shall order" (§ 1495, Code of 1881; § 1500, Rem. Code), as the jurisdictional process enabling the court to order an administrator to make a sale of real property. The order there involved was not served personally. Its publication was relied upon. The publication was made once in each of four successive weeks, but four weeks time did not elapse between the first publication and the date stated in the show-cause order fixing the time of hearing upon the question of whether or not the sale should be ordered. Because of the want of the lapse of four weeks between the first publication and the date fixed for the hearing, it was held that the court failed to acquire jurisdiction to order the sale, and it was accordingly set aside at the suit of certain minor heirs. It may be thought that the holding of the sale to be illegal was because of want of appointment of a guardian *ad litem* for the minors, but manifestly the illegality of the sale was, in its last analysis, rested upon the want of jurisdictional process in the inception of the sale proceedings; that is, want of proper service by publication of the order to show cause why the sale should not be made; since the court would not have power to appoint a guardian *ad litem* for the minor heirs, until it first acquired jurisdiction over them by the original process of an order to show cause, personally served or duly published. In *In re Hoscheid's Estate*, 78 Wash. 309, 139 Pac. 61, the meaning of the same statute was drawn in question and the ruling in *Ball v. Clothier*, *supra*, adhered to, Judge Ellis, speaking for the court, observing:

"The respondent's first contention must be sustained. The statute governing the decree of distribution in probate proceedings, Rem. & Bal. Code, § 1589

Jan. 1922]

Opinion Per PARKER, C. J.

(P. C. 409, § 595), by reference to the statute governing the sale of real estate by an executor or administrator, provides that the decree shall be made only after notice of hearing has been 'personally served on all persons interested in the estate at least ten days before the time appointed for the hearing of the petition, or shall be published at least four successive weeks in such newspaper as the court shall order.' Rem. & Bal. Code, §§ 1499, 1500 (P. C. 409 §§ 395, 397). In this case, though, the notice was published four times, the first publication was on May 18, 1911, and the hearing was set for June 12, 1911. Less than four weeks elapsed between these dates. We have held such a notice insufficient to give the court jurisdiction to make an order of distribution. *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Teynor v. Heible*, 74 Wash. 222, 133 Pac. 1, 46 L. R. A. (N. S.) 1033."

Now the language of these two statutes, touching the time of publication, except as to one word, in so far as we are here concerned with its meaning, is literally the same. The probate statute reads "at least four successive weeks," while this road statute reads "at least two consecutive weeks." It seems difficult to conceive of two different words more completely synonymous than "successive" and "consecutive." It follows that the meaning of these two statutory provisions is exactly the same, except that one relates to four and the other to two "successive" or "consecutive" weeks. Our decisions determining the meaning of this language in the probate statute manifestly are controlling in our present inquiry.

Contention is made that, since the law does not provide for the making or preserving of any record of the publication of the notice inviting bids, the recital by the commissioners in their record that "it appearing further that due notice of same has been given,"—referring to the publication of the notice inviting the bids—becomes a conclusive determination that such

notice was duly given. We may concede, for present purposes, that such recital in the record of the commissioners is *prima facie* evidence that such notice was duly given, and possibly would become conclusive of that fact had we no other evidence upon the question; but manifestly such recital is not conclusive in the sense that it is not rebuttable by evidence. And since we find in the agreed statement of facts that "no other publication of said notice was made or had," whatever presumption may have resulted from the recital in the commissioners' record is entirely overcome, the same as if there had been absolute conclusive proof to the contrary of the recital.

Contention is made that the above quoted provision of the road statute, calling for publication of notice of receiving and opening of bids, is in any event only directory. We cannot so view the statute. Its language is plainly mandatory in form in so far as the publication of the notice for two consecutive weeks is concerned. The fact that the statute further provides that the commissioners may give such other notice as they see fit does not make this mandatory provision directory. We are not here called upon to determine just how this defect in the publication would affect the right of Wyant or the commissioners to assert the invalidity of the contract had they delayed their challenge to the sufficiency of the publication of the notice until after the completion of the improvement. It is not impossible that at such a time some element of estoppel might have in at least some measure stood in their way of making any such claim; but that is not this case. Here, injunctive relief was sought with a fair degree of promptness; and for the courts to refuse such relief, under the circumstances shown in this case, would be to leave the commissioners free to ignore this

Jan. 1922]

Opinion Per BRIDGES, J.

plain mandatory provision of the law, and invite bids for the construction of improvements of this nature in any manner they might choose.

The judgment is affirmed.

FULLERTON, MITCHELL, BRIDGES, and TOLMAN, JJ.,
concur.

[No. 16473. Department One. January 20, 1922.]

JOHN LE BLANK *et al.*, Respondents, v. RUIE E. ELLER
et al., Appellants.¹

APPEAL (47)—DECISIONS APPEALABLE—FINAL ORDERS—RULINGS ON DEMURRER. An appeal does not lie from an order overruling a demurrer, in the absence of a final judgment against the demurrant.

VENDOR AND PURCHASER (97)—PERFORMANCE OF CONTRACT—ASSUMPTION OF MORTGAGE. An agreement to assume and pay a mortgage on land cannot be enforced by the promisee, when the mortgage debt has not been paid by him or by some one on his behalf.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered January 29, 1921, in favor of the plaintiffs, upon overruling a demurrer to the complaint, in an action on contract. Reversed.

Chas. W. Johnson, for appellants.

Geo. A. Brodie, for respondents.

BRIDGES, J.—The defendants jointly and severally demurred to the complaint in this action on the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer, having been overruled, the defendants refused to plead further, and judgment was taken in favor of the plaintiffs and against the defendants, Eller and wife, who have appealed.

¹Reported in 203 Pac. 960.

Although no judgment has been taken against the defendant Hutchings, he has attempted to appeal. He cannot appeal from an order overruling his demurrer, and since no final judgment runs against him, we have no jurisdiction to entertain his appeal.

The sole question, then, is whether the complaint states a cause of action, as against the defendants Eller and wife.

The facts set up in the complaint, as we understand them, are as follows: In October, 1918, the plaintiffs owned a tract of land in Benton county, Washington, consisting of sixty-seven acres. Their ownership was subject to a mortgage on all of the land to secure the sum of \$4,000. During that month they sold and deeded thirty of the sixty-seven acres to the Ellers subject to the \$4,000 mortgage, and a written agreement was entered into between the parties concerning that encumbrance. By that agreement it would appear that the Ellers assumed and agreed to pay the \$4,000 mortgage, but that they were not to pay it at once. Each of the parties was to undertake to get a loan from the Federal Land Loan Bank, for \$2,000, on the land owned by him, and thereby discharge the \$4,000 mortgage, and it was agreed that if this were accomplished, the Ellers should at once give to plaintiffs a second mortgage on their thirty acres, to secure \$2,000, and if they were unable to, or did not, secure these loans from the Federal Land Loan Bank, then the plaintiffs were to be permitted to secure a release of the \$4,000 mortgage as to their thirty-four acres.

Although the agreement is not very specific, it would seem that the idea of the parties was that, if they could not obtain the Federal loan, then the plaintiffs might make arrangements with the holder of the \$4,000 mortgage to pay it \$2,000 and thereby obtain a release of that mortgage as to the thirty-four acres owned

Jan. 1922]

Opinion Per BRIDGES, J.

by them. It was also agreed that, if the plaintiffs did pay that much of the \$4,000 loan, and secure a release as to their portion of the lands, then the Ellers would give them a \$2,000 mortgage on their thirty acres. Apparently all these somewhat complicated arrangements were with the view of making it possible for the plaintiffs to succeed in removing the lien of the \$4,000 mortgage from the land retained by them. But it appears that the parties never obtained the loan from the Federal bank, nor did the plaintiffs at any time actually pay any portion of the \$4,000 mortgage, nor did they ever receive any discharge thereof as to their land. However, they sold their remaining thirty-four acres to one Hutchings for \$3,000, \$1,000 of which was paid in cash, and it was understood that Hutchings would pay the other \$2,000 to the holder of the \$4,000 mortgage. The complaint alleges, however, that Hutchings had failed to pay the \$2,000 either to the plaintiffs or to the owner of the mortgage. It was also alleged that, at the time of the commencement of the suit, the \$4,000 mortgage was due.

The plaintiffs sought a decree of the court requiring the Ellers to pay the \$4,000 mortgage within a time to be fixed by the court, and if they did not pay it within that time, the plaintiffs should have judgment against them in the sum of \$2,000. The judgment which the court made was to the effect that, if the Ellers did not give plaintiffs their \$2,000 mortgage, covering their thirty acres, within fifteen days, then plaintiffs should have a personal judgment against them for that sum.

We think the court was in error in overruling appellants' demurrer to the complaint. That instrument wholly failed to allege that plaintiffs, at any time before the commencement of this suit, had paid, or that any person for or on behalf of them, had paid the \$4,000 mortgage, or any portion of it. It is true the

Ellers assumed and agreed to pay this mortgage, and they have failed so to do, but the plaintiffs would not be entitled to the relief sought in this action until they had paid the mortgage, or some portion thereof. In other words, since they have not paid the mortgage or any portion of it, they have not, in contemplation of law, been injured.

The judgment is reversed, and the cause remanded with directions to sustain the demurrer of the defendants, Eller and wife, and with the privilege to the plaintiffs to amend their complaint.

PARKER, C. J., FULLEBTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16524. Department One. January 20, 1922.]

LEAVENWORTH STATE BANK *et al.*, Respondents, v.
CASHMERE APPLE COMPANY *et al.*, Appellants.¹

SALES (3)—DISTINGUISHED FROM CONTRACT FOR MANUFACTURE. A written contract calling for the sale and delivery of a certain number of apple boxes "now manufactured" and an additional number "to be manufactured" is a contract of manufacture and sale.

EVIDENCE (174, 179)—TO VARY WRITING—CONSTRUCTION OF CONTRACT—INTENT—EXTRINSIC EVIDENCE. Under a contract for the sale and manufacture of apple boxes, with a provision making it "subject to fires," oral evidence is admissible, in an action to recover damages for the nondelivery of the boxes "to be manufactured," to show that the buyer knew when he entered into the contract that the seller had but one plant, which was subsequently destroyed by fire before full delivery could be made.

SALES (72)—PERFORMANCE OF CONTRACT—QUANTITY DELIVERED—EFFECT OF DEFICIENCY. Under a contract for the sale of 75,000 boxes "now manufactured and in stock" at the seller's mill, the seller would be liable for any shortage in the number, although the pile of boxes had been inspected by the buyer, where the latter did not rely upon such examination but was assured by the mill company

¹Reported in 204 Pac. 5.

Jan. 1922]

Opinion Per BRIDGES, J.

that the pile contained sufficient to supply the order, it being incumbent on the seller and not the buyer to know whether there was sufficient in stock.

SAME (37, 77)—CONSTRUCTION OF CONTRACT—CONDITIONS—EXCUSES FOR FAILURE TO DELIVER—LOSS OF PLANT BY FIRE. Where there was a shortage in the number of manufactured apple boxes at the seller's mill which a written contract of sale required to be delivered to the buyer, a subsequent oral agreement between the parties that the difference should be made up by manufacture at the seller's mill constituted an independent contract, and the seller could not take advantage of a clause in the written contract excusing performance in case of fire.

Cross-appeals from a judgment of the superior court for Chelan county, Grimshaw, J., entered February 3, 1921, upon findings in favor of the plaintiffs, in an action for damages for breach of contract, tried to the court. Affirmed.

Hughes & Wallace, for appellants.

Herman Howe and Corbin & Easton, for respondents.

BRIDGES, J.—This action grows out of a written contract entered into on the 22nd day of April, 1919, between the respondent Peshastin Mill Company, as the seller, and the appellant Cashmere Apple Company, as the purchaser. It provided that the:

“Buyer agrees to buy and seller agrees to sell . . . box shooks containing no defects . . . and manufactured in a uniform manner, according to the following specifications and amounts:

“75,000 apple boxes now manufactured and in stock at Leavenworth, Washington, being part of the boxes inspected by the buyer, consisting of . . . [certain sizes described].

“125,000 apple boxes to be manufactured . . . [in certain sizes and dimensions].

“The total pear boxes required by the buyer, manufactured . . . [according to certain sizes mentioned].

“The total cherry lug boxes required by the buyer, manufactured according to standard specifications of the seller . . . [and to be of certain specifications].

“The total cot crates required by the buyer, to be manufactured according to certain standard specifications of the seller . . .

“The total peach boxes required by the buyer, to be manufactured . . . [according to certain sizes].

“The 75,000 apple boxes now manufactured and in stock at Leavenworth, Washington, will be shipped at once. The 125,000 apple boxes to be manufactured will be delivered as rapidly as possible . . .

“It is agreed between the buyer and the seller that this contract is subject to fires, strikes, lockouts, delays in transportation, car shortage, and other contingencies beyond the control of the parties hereto.”

The contract fixed the prices and provided for delivery of the boxes between April and November, 1919.

Of the 75,000 apple boxes described as “now manufactured and in stock at Leavenworth,” only 55,425 were ever delivered; and of the 125,000 apple boxes “to be manufactured” only 25,600 were ever delivered. A part of these deliveries were paid for by the apple company, but it refused to pay for the remainder because it claimed to be greatly damaged by reason of the failure of the Peshastin Mill Company to deliver the remainder of the apple boxes.

A few words at this time concerning the parties to the action are necessary for an understanding of the facts. The Peshastin Mill Company assigned its claim for the balance claimed to be due it for boxes shipped to the Leavenworth State Bank, which was the original plaintiff, and the Cashmere Apple Company, a corporation, was the original defendant. The respondents Mills and Loudonback, copartners, intervened because, after the making of the apple contract, they had become the owners of all of the rights of the Cashmere Apple

Company, and assumed all of its liabilities. They denied any liability to the bank. The interveners and the original defendant, Cashmere Apple Company, by cross-complaint brought into the action the Peshastin Mill Company and Leavenworth Box Company against whom they sought to recover for the failure of the Peshastin Mill Company to deliver apple boxes, as provided in the contract, and they also sought to offset such recovery against any amount which might be found to be due the bank on its assigned claim.

The case was tried to the court without a jury and judgment was entered in favor of the plaintiff bank for the amount sued for, less \$1,761.75 damages awarded by the court to the defendants on their cross-complaint, and on account of the failure to deliver the balance of the 75,000 lot of boxes, and the court's judgment refused to give the cross-complainants any damages on account of the 125,000 lot of apple boxes. The defendants have appealed from that part of the judgment denying them any damages on account of the 125,000 lot of boxes, and the plaintiff has cross-appealed from that portion of the judgment which awarded the cross-complainants \$1,761.75 damages on account of the 75,000 lot of boxes.

In order to simplify the facts, it may be said that the appeal of the defendants involves only that portion of the contract with reference to the 125,000 lot of box shooks, and the cross-appeal involves only that portion of the contract with reference to the 75,000 apple boxes in stock at Leavenworth. None of the other boxes mentioned in the contract are involved here.

In discussing the original appeal, we will refer to the apple company and Mills and Loudenback as appellants, and all the other parties as respondents; and in discussing the cross-appeal we will refer to the bank,

the Peshastin Mill Company and the Leavenworth Box Company as cross-appellants, and all other parties as appellants.

The respondents have at all times admitted that they failed and refused to deliver all of the 125,000 lot of apple boxes, and, as excuse therefor, alleged and undertook to prove that, under the terms of the contract, all of those boxes were to be manufactured by the Peshastin Mill Company at its lumber and box factory located at Blewett, Washington, and that, after it had delivered a portion of such boxes, and on, to wit, the 13th day of August, 1919, its entire mill was destroyed by fire, thus making it impossible for it to comply with its contract; and that, under that provision of the contract which provided that it was subject to fire, strikes, etc., it was relieved of further duty to furnish such boxes. On the other hand, the appellants contend that the contract was merely one of bargain and sale and not one of manufacture and sale, and that the destruction of the mill by fire did not relieve the respondents from complying with the contract. Which contention shall be upheld depends upon what construction shall be given the contract.

The respondents alleged and proved to the satisfaction of the trial court, and to our satisfaction, that, when the contract was made, the Peshastin Mill Company owned and operated but one mill for the manufacture of apple box shooks, and that such mill was the one which was subsequently destroyed by fire, and that the appellants had knowledge of these facts when they entered into the contract. The appellants contend it was error for the court to receive and consider such character of testimony, for the reason that it tended to add to or vary the terms of the written contract, which in itself was complete and definite. We have no doubt,

however, that the court properly received and considered this evidence.

The proper rule is laid down in 6 R. C. L. 849, as follows:

“Courts, in the construction of contracts, look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and accordingly they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described.”

If the respondents had undertaken to prove that there was an oral agreement between the parties that the boxes in question were to be manufactured by the Peshastin Mill Company, at its Blewett mill, then the argument of the appellants would be applicable, and might, under some circumstances, be sustained on the ground that such testimony tended to change the written contract; but the testimony involved here was not of that character. It was nothing more nor less than putting the court in possession of such surrounding facts and circumstances as were possessed by the parties at the time they made the contract, and such class of testimony is always admissible as an aid to a construction of the contract.

The real question, then, is, does the contract mean that the 125,000 lot of apple boxes were to be manufactured by the Peshastin Mill Company at its Blewett mill? The contract itself says that these boxes are to be “manufactured in a uniform manner,” according to certain specifications, and that the 75,000 lot of boxes are “now manufactured,” and that the 125,000 lot of boxes are “to be manufactured” according to certain

specifications, and that the pear boxes and cherry boxes and cot crates and peach boxes are "to be manufactured" according to certain designated specifications, and that the 125,000 lot of apple boxes "to be manufactured will be delivered as rapidly as possible." When these provisions are read in the light of the information which all of the parties had, it seems clear to us that the contract means that the 125,000 lot of boxes were to be manufactured by the Peshastin Mill Company at its Blewett mill. In other words, it was a contract for manufacture and sale and not one of bargain and sale. It would be an unnatural and strained construction to hold that the words "manufactured" and "to be manufactured," so often used in the contract, meant that the boxes were to be made by any person or company. To so hold would be to deprive the provisions with reference to fire and strikes of all or nearly all their use or benefit, for it is manifest that all the numerous existing plants engaged in the business of manufacturing apple boxes, would not likely be destroyed within the seven or eight months within which these boxes were to be delivered.

The appellants cite a large number of cases, but seem most particularly to rely on *Thomson & Stacy Co. v. Evans, Coleman & Evans*, 100 Wash. 277, 170 Pac. 578; *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N. W. 487; and *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555. We find nothing in these cases, or others cited by the appellants, contrary to the view we have expressed.

In the *Thomson* case, *supra*, the appellants were residents of Vancouver, B. C., and entered into an agreement with the respondents to sell them certain standard Calcutta grain sacks, to be delivered at Seattle or Tacoma. One clause of the contract was that "all agree-

Jan. 1922]

Opinion Per BRIDGES, J.

ments contained herein are contingent on strikes, accidents and other delays, unavoidable or beyond our control." The respondents sued the appellants for damages because of failure to deliver the sacks, and the defense was that within the time the sacks were to be delivered, the governments of Canada and Great Britain prohibited the exportation from Canada of any grain sacks such as those described in the contract, and that because thereof, the appellants were unable to comply with their contract. There was nothing at all in that contract which tended to show that the sacks were to be shipped from Canada, or any other British province, and the court very properly held that the action of the Canadian and British governments prohibiting the shipment of such sacks was no defense.

In the *Newell* case, *supra*, the facts were that Newell was a merchant, and entered into a contract with the canning company whereby he was to purchase, and the company was to sell and deliver to him, a certain quantity of ripe tomatoes, to be canned at the cannery of the appellant. The tomatoes were not delivered. Suit for damages resulted. The defense was that, about the time the tomatoes grown by the appellant were to be gathered, an unusual frost destroyed them. The court held that there was nothing in the contract to indicate that the tomatoes purchased were to be grown by any particular person, or on any particular land, and that it was the duty of the appellant to obtain the tomatoes anywhere it could for the purpose of complying with the contract. The court very properly held that such a defense would add an entirely new term or condition to the contract. It seems to us plain that that case is not at all in point. We do not think it necessary to detail the facts of any of the other cases cited. They all involve facts materially different from those in this case.

We hold that, under the terms of the contract here, it was not the duty of the Peshastin Mill Company, after the destruction of its plant, to go into the open market and purchase boxes, or have them manufactured by other concerns, for the purpose of complying with its contract, and that the destruction of its mill by fire relieved it of obligation to deliver any of the 125,000 lot of box shooks subsequent to the fire.

It is now necessary to consider the cross-appeal.

It will be remembered that it concerns only that item of the contract with reference to the 75,000 boxes "now manufactured and in stock at Leavenworth." The testimony seems to show that there were not 75,000 boxes in the pile located at Leavenworth, and that on that account the cross-appellant did not deliver the complete number provided for by the contract, to wit, 75,000. They contend that, before the contract was entered into all the parties to it examined this pile of box shooks and each supposed that there were at least sufficient there to supply the demand of the contract. Cross-appellant cites many cases to the effect that, where both parties to a contract assume the existence of a certain thing, and contract with reference to that assumption, if the thing assumed to exist does not in fact exist, then the contract is void. The testimony here, however, as found by the trial court, and we think the finding was correct, does not make the doctrine contended for by the cross-appellant applicable to this case. While it is true that both parties to the contract saw and examined the pile supposed to contain 75,000 boxes, yet the examination made by cross-respondents was not, and could not have been such as that they could determine that there would not be a shortage. On the other hand, the pile of boxes belonged to the Peshastin Mill Company, and it was its business to know whether there

Jan. 1922]

Opinion Per BRIDGES, J.

were as many shooks in the pile as it agreed to sell therefrom. Besides this, the testimony shows that the purchasers did not rely upon their investigation, but were assured by the mill company that there were amply sufficient boxes in the pile to furnish the amount provided for in the contract.

But cross-appellant further contends that, after the parties learned of the shortage, there was an oral agreement between them that the difference should be made up by the mill company manufacturing them at its plant at Blewett, and it is contended that such oral contract was but a modification of the written contract in that regard, and that the fire clause in the written contract is applicable and would relieve the Peshastin Mill Company. We cannot accept this view. In the first place, we do not think the evidence shows that any new contract or arrangement was made; and if it should be conceded that it was made, it would be entirely independent of the written contract, and the mill company would be bound to comply with the oral contract, and the destruction of the mill would not relieve it. A very thorough consideration of this case convinces us that the judgment of the trial court was right, and we affirm it.

PARKER, C. J., FULLEBTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16550. Department One. January 20, 1922.]

LEAVENWORTH STATE BANK, *Respondent and Cross-Appellant*, v. WENATCHEE VALLEY FRUIT EXCHANGE, *Appellant*, S. & G. FRUIT COMPANY, *Appellant*, PESHASTIN MILL COMPANY, *Cross-Appellant*.¹

ASSIGNMENTS (20)—OPERATION AND EFFECT—RIGHTS TRANSFERRED—RECOVERY OF FULL AMOUNT. Where a manufacturer on shipping goods to a purchaser assigns the invoice therefor to a bank for borrowed money less in amount than the face of the invoice, the bank thereby acquires a right of action against the purchaser for the full amount of the invoice price, under Rem. Code, § 191, notwithstanding the assignor may have an interest in the thing assigned.

SALES (72)—PERFORMANCE OF CONTRACT—QUANTITY—EXCESS DELIVERY. Where a fruit company, after contracting in writing with a mill company for a quantity of pear boxes, orally arranges that a portion of the boxes should be shipped to another fruit company, the former company would not be liable for any excess of boxes over the contract quantity delivered without its knowledge to the latter company.

INTERPLEADER (5)—JUDGMENT. One who is not an original defendant cannot complain that judgment is rendered against him, where he voluntarily intervenes in the action, makes a defense, and seeks affirmative relief against the plaintiff.

SALES (72) — PERFORMANCE OF CONTRACT—QUANTITY—EFFECT OF EXCESS DELIVERY. Where, under a written contract between a mill company and a fruit company, 15,000 pear boxes were to be delivered at a stated price, and by subsequent oral agreement a car load of the boxes was to be shipped to another fruit company without any stipulation as to price, the latter company would be liable for the prevailing market price at time of delivery on such quantity of boxes as were in excess of the 15,000 called for by the written contract between the original parties.

Cross-appeals from a judgment of the superior court for Chelan county, Grimshaw, J., entered October 8, 1920, upon findings in an action for damages for breach

¹Reported in 204 Pac. 8.

Jan. 1922]

Opinion Per BRIDGES, J.

of contract, tried to the court. Affirmed as to defendant's appeal; reversed as to plaintiff's cross-appeal.

Hughes & Wallace, for appellants.

Herman Howe and *Corbin & Easton*, for respondents and cross-appellants.

BRIDGES, J.—This action grows out of a written contract between the Peshastin Mill Company, as the seller, and Wenatchee Valley Fruit Exchange, a corporation, as the purchaser. In many respects this is a companion case with that of *Leavenworth State Bank v. Cashmere Apple Co.*, ante p. 356, 204 Pac. 5. The contract here is substantially the same as the one involved in that case, except as to the amount of the boxes. In this contract the seller agreed to sell and the purchaser agreed to purchase "40,000 apple boxes, now manufactured and in stock at Leavenworth, Washington", and "200,000 apple boxes to be manufactured", according to certain specifications, and "15,000 pear boxes to be manufactured" according to certain specifications, and certain other kinds of boxes which this action does not particularly concern. The purchaser paid \$1,000 down on the purchase price. Further provisions will be found in the contract shown in the *Cashmere Apple Company* case, *supra*.

Apparently all of the 40,000 lot of apple boxes "now manufactured and in stock at Leavenworth" were delivered; but a large amount of the lot of 200,000 apple boxes "to be manufactured" were never delivered. It appears that there were eight different carloads of boxes shipped out in the name of the Wenatchee Valley Fruit Exchange, some of which were delivered to that company, and some to the S. & G. Fruit Company. The sixth carload, which was of pear boxes and which is the basis of plaintiff's sixth cause of action, and in

part the basis of a cross-appeal by the plaintiff, was delivered to the S. & G. Fruit Company.

The situation of the various parties to the action is somewhat confusing, and we think it advisable to say a few words with reference thereto. The Peshastin Mill Company, which was the seller in the contract, assigned its claim against the Wenatchee Valley Fruit Exchange for all of the eight carloads of boxes shipped, to the Leavenworth State Bank, which originally brought this action against the Fruit Exchange, as the sole defendant. In a general way, that defendant's answer denied any liability to the bank. At this stage of the proceedings, the S. & G. Company intervened and joined with the original defendant, Wenatchee Valley Fruit Exchange, in what they designate as,

“an affirmative defense, and by way of counter-claim and set-off against each of the several causes of action set up in the plaintiff's complaint, and as a cross-complaint against the Peshastin Mill Company, a corporation, and the Leavenworth Box Company, a corporation, and joined therewith and made a part thereof the complaint in intervention of the S. & G. Fruit Company, a corporation.”

These joint pleaders, in substance, admitted that they had received the various boxes sued for, and alleged that the bank and the Peshastin Mill Company and the Leavenworth Box Company had breached the contract hereinbefore mentioned, in that they had failed to ship a large portion of the 200,000 lot of apple boxes, and sought set-offs and damages in a sum in excess of \$15,000.

The total amount sued for by the plaintiff was \$7,533, less certain freights which had been paid by the companies receiving the shipments. The court gave the bank judgment for \$6,012.78, together with

Jan. 1922]

Opinion Per BRIDGES, J.

interest, and refused any relief to the Wenatchee Valley Fruit Exchange and the S. & G. Fruit Company on their cross-complaint and counterclaim. The companies last named have appealed from that part of the judgment refusing them damages on their counterclaim, and the bank has cross-appealed on the ground that its judgment should have been for a larger sum.

In discussing the original appeal, we will refer to the Wenatchee Valley Fruit Exchange and the S. & G. Company as appellants, and the other parties as respondents; and in discussing the cross-appeal, we will refer to the bank and the Peshastin Mill Company as cross-appellants, and all of the other parties as cross-respondents.

We will first discuss the original appeal.

The respondents have at all times admitted they failed to deliver a large portion of the 200,000 lot of apple boxes and as an excuse therefor alleged, and undertook to prove, as was done in the *Cashmere Apple Company* case, *supra*, that under the terms of the contract all of those boxes were to be manufactured by the Peshastin Mill Company at its lumber and box factory, located near Blewett, Washington, and that, after it had manufactured and delivered a portion of such boxes, and on, to wit, the 13th day of August, 1919, its entire mill was destroyed by fire, thus making it impossible for it to comply with its contract; and that, under the provisions of that instrument with reference to fires, strikes, etc., they were relieved of further duty in that regard. The appellants, however, contend that the contract was one of bargain and sale and not manufacture and sale, and that the destruction of the mill did not relieve the respondent from furnishing the whole of the boxes provided for in the contract.

The legal questions involved here, in so far as the original appeal is concerned, are substantially the

same as those involved in the original appeal in the *Cashmere Apple Company* case, *supra*, and what was said there with reference to the original appeal is applicable here, and we do not consider it necessary to make any further discussion of the question. The conclusion reached in the *Apple Company* case, *supra*, was to affirm the judgment to the effect that the appellants were not entitled to recover anything on their counterclaim and cross-complaint. For the reasons there given we come to the same conclusion here.

We will now consider the cross-appeal.

Two distinct questions are involved therein. The first one is based upon the following facts: The testimony shows, and the trial court found, that, as the Peshastin Mill Company loaded and shipped out each carload of boxes, it borrowed from the bank eighty-five per cent of the amount of the value of each invoice, and at that time gave to the bank its promissory note for the amount so obtained, and delivered to the bank, as collateral security, the invoice. Each one of these invoices was assigned to the bank in the following words: "For value received this account has been assigned to the Leavenworth State Bank, Leavenworth, Washington. Please remit to them when due." The trial court refused to give the bank judgment for any amount more than it advanced on the invoices, to wit, eighty-five per cent thereof, and it has cross-appealed because the court refused judgment for the full amount of the invoices, less proper set-offs or counterclaims. The cross-respondents concede that an assignee of an account may recover the whole amount assigned, less proper offsets, even though there was no consideration for the assignment, and the assignee is in law bound to account to the assignor; but contend that, where the assignment is

Jan. 1922]

Opinion Per BRIDGES, J.

made only for security, the recovery is limited to the amount of the debt which was secured. On the other hand, the cross-appellant argues that the fact that the assignment was made as security can make no difference so long as the whole amount has been assigned.

Section 191, Rem. Code (P. C. § 8272), provides that any assignee of any book account or chose in action for the payment of money and by assignment in writing, may by virtue of such assignment:

“—sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned: Provided, that any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner, against the debt assigned, save that no counterclaim or offset shall be pleaded against negotiable paper assigned before due, and where the holder thereof has purchased the same in good faith and for value, and is the owner of all interest therein.”

This question is not a new one in this court. In the case of *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788, we said:

“While Hochbrunn was on the stand he testified that the claim sued upon had been assigned to the respondent as security for a debt, and that the debt had been fully paid prior to the trial. The assignment was in writing, and there had been no reassignment of the claim from the respondent to Hochbrunn. The appellant contends that the payment of the debt itself operated as a reassignment of the claim, and hence the respondent was not the real party in interest.”

The court then proceeded to show that the mere fact that the debt was paid did not amount to a reassignment of the claim, and further said:

“So here, notwithstanding the respondent may have held the claim at the time of the trial by a mere naked

legal title, we think he had such an interest as would entitle him to maintain this action in his own name.”

To the same effect are *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209; *Riddell v. Prichard*, 12 Wash. 601, 41 Pac. 905; *State ex rel. Adjustment Co. v. Superior Court*, 67 Wash. 355, 121 Pac. 847; *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 Pac. 861; *Olsen v. Hagan*, 102 Wash. 321, 172 Pac. 1173.

In vol. 2 R. C. L., p. 640, the rule is laid down as follows:

“It is sometimes provided by statute that every action must be prosecuted in the name of the real party in interest, and under such statutes it is generally held that an assignment absolute in its terms, and vesting in the assignee the apparent legal title to a chose in action, is considered as being unaffected by a collateral contemporaneous agreement respecting the proceeds, and the assignee may sue in his own name as the real party in interest, even though the entire consideration for the assignment is made to depend on the contingency of collection, or the assignee is to account to the assignor for the proceeds when collected. In the majority of jurisdictions it is no defense to an action on commercial paper that the plaintiff may be holding it without consideration or subject to equities between him and the assignor.”

In the case of *Manley v. Park*, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967, the court, addressing itself to this subject, said:

“The original owner is still the person to be finally benefited by the litigation, but his legal demand is no longer against the maker of the note, but against the person to whom he has assigned it. When the obligor is sued by such assignee (no claim as innocent purchaser being involved), he can make any defense he could have made against the assignor; he is fully protected against another action; and in no way is it a matter of the slightest concern to him what arrange-

Jan. 1922]

Opinion Per BRIDGES, J.

ment between the plaintiff and the original creditor occasioned the assignment. This being true, it would be a sacrifice of substance to form to permit the defendant to defeat the action by showing a failure of consideration for the transfer, or that the plaintiff was bound to account to his assignor for a part or all of the proceeds."

In this case the assignment of the whole of each invoice was made to the bank, and if the bank be paid the full amount, certainly the debtor could not thereafter be called upon by the assignor to pay any portion of the debt. If the debtor is protected in his payment to the assignee, it can be no concern of his that the assignee must account to the assignor for a part or the whole amount so collected.

It is our conclusion that the plaintiff had a right to recover the whole amount of the assignments less any just offset or counterclaim.

The second division of the cross-appeal is upon the following facts: The contract provided for 15,000 pear boxes at \$14.50 per hundred. The sixth cause of action was for \$1,440 on a shipment in one car of 8,000 pear boxes at the market price of \$18 per hundred, instead of \$14.50 per hundred, as provided in the contract. It also appears that previous to that shipment all but 3,800 of the 15,000 pear boxes provided by the contract had been shipped and the shipment of the 8,000 pear boxes was in excess of the contract number by 4,200 boxes, and the court refused to give judgment against either of the cross-respondents on account of that excess, although it appears to be admitted that the excess was received and retained by the S. & G. Fruit Company.

The cross-appellants contend that they are entitled to judgment against either or both of the appellants on such excess boxes, at the market price at the time of

the shipment, which it appears was \$18 per hundred. We are satisfied that the Wenatchee Valley Fruit Exchange, at the time of making the contract, or thereafter, orally arranged with the Peshastin Mill Company that parts of the boxes contracted for should be shipped directly to the S. & G. Fruit Company, but we find nothing in the testimony which indicates that the Valley Fruit Exchange ordered any excess pear boxes shipped, nor did it know that any such excess had been shipped and delivered to its co-cross-respondent. Under these circumstances, we do not see how the Exchange could be made liable for such excess of boxes at any price, and the court was right in refusing to give judgment against it on account of such excess boxes.

But the testimony seems to indicate that there was some verbal arrangement between the Peshastin Mill Company and the S. & G. Fruit Company, whereby the former was to ship to the latter this full carload of pear boxes. Since the Peshastin Mill Company actually shipped this excess of pear boxes, and the S. & G. Fruit Company actually received and used them, it would seem that the latter ought to pay for them. It certainly cannot receive the boxes and use them without making compensation. The court refused, however, to give any judgment against it. In its brief in answer to the cross-appeal, it admits that these extra boxes "were delivered under an oral contract between the Peshastin Mill Company and the S. & G. Fruit Company" and "that the arrangement for the shipment . . . was made with Mr. Griner, one of the officers of the S. & G. Fruit Company." But it contends that no judgment can be rendered against it in this action because the bank did not sue it, and because it was not in the action in such a way as that judgment

Jan. 1922]

Opinion Per BRIDGES, J.

could be rendered against it. We are of the opinion that the court erred in this regard. It is true the S. & G. Company was not an original defendant, but it voluntarily intervened, made a defense and sought affirmative relief against the bank and the Peshastin Mill Company. All of the parties were before the court, and it would seem a useless procedure to deny the plaintiff recovery in this case and force it to an independent action. The court should have entered judgment against the S. & G. Fruit Company on account of the excess.

The question then arises whether such boxes should be paid for at the contract price of \$14.50 or \$18 per hundred, the market price at the time of delivery. It is clear to us that these excess boxes were not, and could not have been, shipped and delivered under the contract. About the only testimony on this feature of the case is that of one of cross-appellant's witnesses to the effect that it was agreed that the shipment should be made at the market price. It would therefore appear that there was an independent oral arrangement between the S. & G. Fruit Company and the Peshastin Mill Company concerning these excess boxes, and that such arrangement was entirely aside from the written contract. We conclude, therefore, that the bank was entitled to judgment against the S. & G. Fruit Company on account of the 4,200 excess boxes at \$18 per hundred, or a total of \$756 and interest.

The judgment in so far as it is affected by the original appeal is affirmed. In so far as it is affected by the cross-appeal it is reversed, with directions to enter judgment in favor of the bank and against the Wenatchee Valley Fruit Exchange in accordance with this opinion, and also a judgment against the S. & G.

Fruit Company and in favor of the bank on account of the excess pear boxes at the price of \$18 per hundred.

PARKER, C. J., FULLEBTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16152. *En Banc*. January 20, 1922.]

GRAY & BARASH, INCORPORATED, *Respondent*, v. PUGET SOUND NAVIGATION COMPANY, *Appellant*.¹

SALES (85)—CONTRACT—WHEN TITLE PASSES—INTENT—EVIDENCE—SUFFICIENCY. Whether title to a chattel has or has not passed by a contract of sale is a matter determinable by the intention of the parties, which is controlling, if clearly and unequivocally manifested by their agreement; and where the title must rest in one of two persons, evidence which determines the title as between them will determine it as between one of them and a stranger to the title who asserts it to be in the other.

CARRIERS (27, 33)—OF GOODS—LOSS OF OR INJURY TO GOODS—LIABILITY—PROOF OF TITLE. Where an electric motor, in course of shipment by carrier between the prospective seller and buyer of the motor, is damaged by the negligence of the carrier, the seller is the proper party to maintain action against the carrier, if there had been in fact no acceptance of the motor by the buyer, no payment of any part of the purchase price, no consummated sale, and the mutual dealings of the parties had been closed on the basis that no sale had taken place.

SAME (27, 33). Where damages are sought from a common carrier for injury to property while in its possession for carriage, and it has no interest in the ownership of the property other than that of not being called upon to answer more than once for its wrong, the same high degree of proof of ownership is not required as is the case when a contest is between individuals each claiming the title.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 19, 1920, upon findings in favor of the plaintiff, in an action for injury to goods while in transit, after a trial on the merits to the court. Affirmed.

¹Reported in 203 Pac. 975.

Jan. 1922]

Opinion Per FULLERTON, J.

Bronson, Robinson & Jones, for appellant.*Palmer & Askren*, for respondent.

FULLERTON, J.—In November, 1917, the respondent, Gray & Barash, Inc., who was then engaged in the machinery business at Seattle, contracted to sell to the Puget Sound Traction, Light & Power Company, of Bellingham, an electric motor. The motor was shipped shortly after the contract was entered into. On its receipt by the traction company, it was found to be defective, the defect apparently having been caused by some accident happening while the motor was in transit. On discovering the defect, the traction company called the attention of the respondent to it and was directed by the respondent to return the motor to the shops of the respondent at Seattle for repairs. The traction company delivered the motor to the appellant, Puget Sound Navigation Company, for transportation in accordance with the respondent's direction, and that company, in attempting to load the motor from a wharf onto one of its boats, dropped the motor into the salt waters of Puget Sound. The motor remained in the water from the evening of November 24th until the morning of the 28th of the same month, when it was recovered and carried on to Seattle. The submergence of the motor in the salt water so injured it as to require rewinding of the stator of the motor, and this the respondent did, at a cost to itself in labor and materials of six hundred and fifty dollars. The motor, after its repair, was again forwarded to the traction company, who later declined to accept as a compliance with the contract of sale and returned it to the respondent. The respondent thereupon disposed of it as its own property to a third party.

In this action the respondent seeks to recover from the appellant the expense incurred in repairing the

motor due to its submergence in the salt water. In its complaint, in addition to alleging facts showing liability on the part of the appellant, it alleged that it was the owner of the property at the time of the injury, and that it had been damaged by reason of the injury in the amount it had expended in making the repairs. The answer of the appellant took issue on these allegations only. On the trial the only question contested was the question of ownership; the appellant contending that the title to the motor at the time of the injury was in the traction company, and that the respondent was without right to maintain the action. The cause was tried to the lower court sitting without a jury and resulted in a judgment in accordance with the prayer of the respondent's complaint.

The principal controversy in this court is over the question of ownership of the motor at the time of the injury. The contract of sale was oral; at least no written contract was introduced in evidence. Testifying as to its terms, the president stated that the terms of the sale were cash on thirty days' time, subject to the guaranty that the motor would work satisfactorily for one year. The superintendent of the traction company testified to the same effect, other than that he stated that the guaranty was that the motor would work satisfactorily. Each of them testified that no part of the purchase price was ever paid, that the motor did not work satisfactorily, and that the sale was never consummated. In addition to this, the president of the respondent testified that the respondent was the owner of the motor at the time of the injury, and that it had suffered the loss caused to the motor by the act of the appellant in dropping it into the water. On cross-examination, it was developed that the respondent, on returning the motor to the traction company after the injury had been

Jan. 1922]

Opinion Per FULLERTON, J.

repaired, billed the cost of the repair to the traction company, and that the traction company presented the bill to the appellant with a demand for its payment, saying in the letter containing the demand that "we are merely charging you for the material and labor used in repairing this machine, and not making a claim for damage due to the loss of time on account of the fact that we did not have this motor when we needed it very badly."

It is a general rule that, in determining whether the title to a chattel has or has not passed by a contract of sale, the primary consideration is one of intention; that the agreement is what the parties intended to make it; and if the intention is manifested clearly and unequivocally, it controls. *Pacific Lounge & Mattress Co. v. Rudebeck*, 15 Wash. 336, 46 Pac. 392; *Lauber v. Johnston*, 54 Wash. 59, 102 Pac. 873; *North Idaho Grain Co. v. Callison*, 83 Wash. 212, 145 Pac. 232.

It is the rule, also, that when title to a chattel must rest in one of two persons, evidence which determines the title as between them will determine it as between one of them and a stranger to the title who asserts it to be in the other. *Union Feed Co. v. Pacific Clipper Line*, 31 Wash. 28, 71 Pac. 552.

The evidence, when tested by these principles, we think clearly justifies the conclusion of the trial court. The argument to the contrary is based upon the terms of the contract of sale, as testified to by the representatives of the parties to it, and upon the fact that the traction company demanded payment for the cost of repairing the injury. But we cannot think these conclusive of the question. The contract is not inconsistent with the idea that a present title did not pass, and the other fact is explainable on the theory that the

parties then believed that the sale might thereafter be consummated and the traction company ultimately become the sufferer from the loss. But treating this part of the evidence as inconsistent with the present claims of the parties to the contract, we are unable to conclude that it overcomes the more positive evidence to the contrary. There was in fact no acceptance of the motor, no payment of any part of the purchase price, and no consummated sale, and the parties to the contract closed their mutual dealings on the basis that no sale had taken place. The parties to the contract are therefore estopped, as between themselves, from asserting an actual sale, and of course estopped from asserting it as against any one else. Since, as between the parties, no present sale was intended or contemplated by the contract, and since that intent governs the rights of the appellant, we see no just reason why it should not be held to respond to the respondent for the injury committed by it.

Furthermore, when it is remembered that the appellant is a common carrier, that it wrongfully injured the property while it had the property in possession for the purpose of carriage, and that it has no interest in its ownership other than that it shall not be called upon to answer more than once for its wrong, it would seem that the same high degree of proof of ownership would not be required as is required when the contest is between individuals each claiming the title. It is true, of course, that a carrier who wrongfully injures property while in its possession for the purpose of carriage is not called upon to answer to one without interest, even though the party in interest refuses to assert his right. But this is not the present case. Here the party making the assertion has a substantial interest. As we have

Jan. 1922]

Syllabus.

shown, it is the sufferer from the loss and must bear it if it may not recoup from the appellant.

The judgment will stand affirmed.

PARKER, C. J., MAIN, HOLCOMB, TOLMAN, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16552. Department One. January 20, 1922.]

A. M. FINN *et al.*, *Respondents*, v. THE CITY OF
BREMERTON, *Appellant*.¹

DEPOSITIONS (6, 7-1)—RETURN—SEALED ENVELOPES. The requirement of Rem. Code, § 1243, that depositions shall be transmitted by mail in a sealed envelope to the clerk of the court before whom the action is pending is complied with where the deposition is wrapped in wrapping paper whose edges are sealed together and the enclosure reinforced by tying with string and thus deposited in the mail, though the covering may have become torn during the transmission through the mails.

DISCOVERY (11)—PHYSICAL EXAMINATION OF PLAINTIFF—DISCRETION. It is not an abuse of discretion to refuse to order a physical examination of plaintiff in a personal injury case when the plaintiff is in a distant state, her deposition is before the court, and the granting of the order would have required a continuance of the trial and possibly its ultimate dismissal.

TRIAL (13)—VIEW OF PREMISES—DISCRETION. A view by the jury of premises where a personal injury occurred being a matter wholly within the discretion of the trial court, error cannot be founded on its denial of a request therefor.

TRIAL (29)—REBUTTAL EVIDENCE—ADMISSIBILITY. Where plaintiff, injured by a fall on a sidewalk, testified she was wearing shoes with "medium height Cuban heels," the offer of rebuttal testimony that there were no shoes known to the trade having medium height Cuban heels was properly refused as not contradictory, nor within the issues, as independent evidence of contributory negligence.

PLEADING (101, 112)—TRIAL AMENDMENTS — DISCRETION — NEW CAUSES OF ACTION. The refusal to allow a trial amendment to defendant's answer so as to set up an additional element of contrib-

¹Reported in 203 Pac. 971.

utory negligence was not an abuse of the court's discretion, where the matter was not newly discovered, would have introduced a new issue, and would have necessitated a continuance of the cause or a submission of the case on the defendant's evidence alone.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered January 15, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a fall upon a sidewalk. Affirmed.

F. W. Moore, for appellant.

Bryan & Garland, for respondents.

FULLERTON, J.—The respondents recovered in this action against the appellant, city of Bremerton, for personal injuries received by the respondent Anna May Finn from a fall upon the sidewalk of the appellant city. Damages were claimed in the sum of twenty-five thousand dollars. The jury returned a verdict in the sum of five hundred dollars. Judgment was entered for the sum found by the jury, and the appeal is from the judgment so entered.

The errors assigned relate principally to rulings made by the court during the progress of the trial, and these we will notice in the order in which the appellant presents them in its brief.

The evidence of the respondents was by deposition, taken upon notice before a notary public in the state of New York, and it is objected that they were not returned to the trial court in the manner the statute requires. The statute thought to be offended against is found at § 1243, Rem. Code (P. C. § 7738), and, in so far as it is here material, reads as follows:

“The deposition, whether taken upon notice or upon a commission, shall be inclosed in a sealed envelope, by the officer taking the same, and directed to the clerk of

Jan. 1922]

Opinion Per FULLERTON, J.

the court, . . . before whom the action is pending,
. . . and either delivered to the clerk of the court
. . . or transmitted through the mail . . .”

The officer taking the deposition, after it was properly signed and certified, wrapped it in some form of wrapping paper, pasted the edges of the paper together so as to form a sealed enclosure, reinforced it by placing a string around it, addressed the package to the clerk of the court in which the action was pending, and deposited it in the mail. When the package reached the clerk, the covering was somewhat torn perhaps sufficiently to expose in part the paper upon which depositions were written. It is objected that the enclosure is not the “sealed envelope” the statute prescribes. We are, however, of the contrary view. While the term “envelope” may have a technical signification, its more general definition is “that which envelopes; a wrapper; or an enclosing cover;” and it is in this broader sense the term is used in the statute. Within this general meaning, the enclosure here in question was plainly a sealed envelope. The fact that the covering was torn during its transmission through the mail did not prevent the use of the deposition by the party desiring it. This was an accident for which neither party to the action was responsible, and to permit it to work a suppression of the deposition could well amount to a denial of justice. Moreover, in this state a substantial compliance with the statute relating to the taking and returning of depositions is all that is necessary. While in a number of jurisdictions a strict compliance is required, we have said that the first is the better rule. *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470. Clearly, there was here a substantial compliance with the statute.

At the opening of the trial, the appellant moved for an order of the court requiring the injured respondent

to appear and submit to a physical examination, touching the nature, character and extent of her injuries. At that time the action had been at issue many months. The depositions of the respondent had been taken, and the appellant had been thereby advised that she would probably not appear in person at the trial. She was not personally present at the time the application was made, and did not subsequently appear personally at the trial. The court denied the motion on the ground that it was not timely made, and it is argued that it erred in so doing. We cannot so conclude. Whether the court will in any case require a plaintiff to submit to a physical examination is largely a matter within its discretion. While it is a discretion capable of abuse, it must be clear that there was such an abuse before an appellate court will so hold. Here, manifestly, there was none. To grant the request would have required a continuance of the trial, even if not its ultimate dismissal, and we have held it not an abuse of discretion to deny such a motion when the effect of granting the motion would only delay the trial. *Myrberg v. Baltimore & S. M. & R. Co.*, 25 Wash. 364, 65 Pac. 539.

The case cited was decided prior to the enactment of the statute on the subject, but the rule in this respect was not changed by the statute. Whether or not a physical examination of the person injured as to the extent of the injury will be ordered is still within the discretion of the court. Rem. Code, § 1230-1 (P. C. § 7765); *Titus v. Montesano*, 106 Wash. 608, 181 Pac. 43.

It is next complained that the court erred in refusing the request of the appellant to have the jury view the premises where the injury occurred. But whether a view of the premises will be ordered in any instance is wholly within the discretion of the trial court, and any denial of such a request cannot be made the foundation for a claim of error. *Klepsch v. Donald*, 4 Wash. 436,

Jan. 1922]

Opinion Per FULLETON, J.

30 Pac. 991, 31 Am. St. 936; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903; *Sedro-Woolley v. Willard*, 71 Wash. 646, 129 Pac. 372.

The further assignments of error relate to the exclusion of evidence and are discussed by the appellants under one heading, and we will so consider them. In the cross-examination of the injured respondent, she was questioned as to the clothing and the character of the shoes she wore at the time of her injury. Concerning the clothing, she answered that the only article that she had remaining was the dress-skirt, which she produced; the skirt being marked for identification, and forwarded along with her deposition. As to the shoes, she testified that they had long since been worn out and thrown away. She described the shoes as being "white kid oxfords" with "medium height Cuban heels." At the trial the appellant produced a shoe dealer and offered to prove by him what a Cuban heel was and to prove further that a shoe with a Cuban heel was a recognized standard shoe, that the heels of such shoes were from two and one-half to three inches in height, and that there were no shoes known to the trade which had heels described as medium height Cuban heels. The court excluded the offered evidence on the grounds that it did not tend to contradict the testimony of the respondent, and that, as independent evidence of contributory negligence, it was not within the issues, there being no allegation in the plea of contributory negligence that the character of the clothing and shoes the injured respondent was wearing was the cause of or in any manner contributed to her injury. The appellant thereupon offered to amend its answer in this respect, which offer the court likewise refused.

We find no error in these rulings. The evidence plainly contradicted nothing to which the witness had

testified, and whether an amendment to the pleadings would then be permitted was within the sound discretion of the trial court, and is subject to review only for manifest abuse. Manifestly there was here no abuse of discretion. The amendment would have introduced a new issue, which the respondents were not required prior thereto, and in fact had not made preparation to meet. The evidence was not newly discovered, and the trial was then nearing its close: To have allowed the amendment would have necessitated either a continuance of the cause, or a submission of the question to the jury on the appellant's evidence alone. Plainly, if the appellant desired to make this a defense it owed the duty under the circumstances shown to have apprised the respondents of the fact before the trial was entered upon. Having failed in that duty, it should not now be heard to complain that a right has been denied it.

The remaining assignments of error go to the sufficiency of the evidence to sustain the verdict. But without reviewing the evidence, we are clear that sufficient was shown to require the submission of the appellant's liability to the jury. There was, it is true, no proof of permanent injury, but the proofs of temporary injuries was abundantly sufficient to warrant the very modest verdict the jury returned.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ.,
concur.

Jan. 1922]

Statement of Case.

[No. 16711. Department One. January 20, 1922.]

ALMA DE LA POLE, *Appellant*, v. TROY LINDLEY, as
*Executor etc., et al., Respondents.*¹

LIMITATION OF ACTIONS (56)—FRAUD—DISCOVERY OF FRAUD. Where a mother, as administratrix during the minority of her daughter, makes a sale of real estate in which the daughter has a half interest, to herself through the intervention of a third party, and the daughter does not discover the attempted elimination of her own rights until the death of her mother, some nineteen years later, she is not chargeable with laches nor barred by the statute of limitations from seeking a recovery of her interest in the estate.

EXECUTORS AND ADMINISTRATORS (134)—SALE—VALIDITY—PARTIES ENTITLED TO PURCHASE—ADMINISTRATRIX. An administratrix of an estate stands in a fiduciary relation to those beneficially interested, and whether an unauthorized sale is void or voidable, is not material, where other interests have not intervened, and, irrespective of her own good faith, the administratrix is subject to the rule that a trustee is bound to do that which will best serve the interests which for the time are intrusted to her care.

DESCENT AND DISTRIBUTION (13, 14)—ACTIONS BY HEIRS—RECOVERY OF MESNE PROFITS. A daughter, entitled to one-half of the mesne profits of her father's estate, is not entitled to recover therefor from the estate of her mother, where the income from the property was used indiscriminately for the support and pleasure of mother and daughter, and there is no evidence that the entire income was not mutually spent and consumed for such purpose.

EXECUTORS AND ADMINISTRATORS (149)—ACTIONS BY HEIRS—LIMITATION. Where an heir of one-half of her father's estate joins with her mother, after attaining legal age, in a deed to a tract of land in which she has a half interest, without demanding her share of the purchase price, she cannot, after the bar of the statutory period of limitation, assert a right of action against her mother's estate for her portion of the purchase price appropriated by the mother.

Appeal from a judgment of the superior court for Columbia county, McCroskey, J., entered July 5, 1921, upon findings in favor of the defendants, in an action by an heir to recover an interest in an estate, after a trial on the merits to the court. Reversed.

¹Reported in 204 Pac. 12.

S. A. Keenan and R. M. Sturdevant, for appellant.

Will H. Fouts and Roy R. Cahill, for respondents.

TOLMAN, J.—Appellant was born on March 14, 1883, and when she was three years of age she was legally adopted by John W. Duncan and his wife, Clara A. E. Duncan, who had no children of their own.

The Duncans, during their married life, acquired farm lands aggregating five hundred and fifty-five acres, in Columbia county, upon which they, with their adopted child, made their home. Mr. Duncan died intestate on February 19, 1898. His widow was duly appointed administratrix of his estate, and filed an inventory which covered and described, as community property, all of the real estate above referred to, and personal property which was appraised at \$1,328. A few months after her appointment, the administratrix filed a petition, asking to have \$500 worth of the personal property set aside as exempt, and for the sale of the remainder to pay the debts of the estate, which were stated to amount to about \$3,200. A report filed by her in October, 1899, shows that, from the proceeds of the personal property and the crops raised upon the land, the indebtedness of the estate to outside parties had been reduced to \$1,718.25, including a mortgage on the real estate, and that there was due to the widow, \$1,665.43, unpaid allowance for family expense, and \$1,005 advanced by her to assist in paying a mortgage, which had been discharged, and it is therein stated that, if the time for the closing of the estate be extended for one year, the proceeds of another crop would probably pay all indebtedness, without the necessity of selling any of the real estate.

In April, 1900, the administratrix filed a petition asking that the real estate be sold to pay the debts, which

Jan. 1922]

Opinion Per **TOLMAN, J.**

she then listed at \$8,200, more than three-fourths of which were due to herself, and an order was made directing that the real estate, excepting one hundred and sixty-one acres (one hundred and twenty acres of which the widow, after the making of the inventory, seems to have concluded was her separate property), be sold at private sale. A guardian ad litem was appointed for the infant daughter, who consented to the order of sale. The property to be sold was re-appraised at \$10,300. Two bids were reported; one from Wright Knapp, who had been a hired man in the employ of the administratrix, and who, so far as appears, was without any means to purchase, and a higher bid from Margaret J. Edmundson for \$9,570.50, which bid was accepted, and the sale confirmed by the court, the guardian ad litem consenting thereto.

It now appears clearly and without substantial dispute that the purchaser at this sale, Mrs. Edmundson, was a sister of the administratrix; that she came from her home in Eugene, Oregon, at the request and expense of the administratrix for the sole purpose of rendering her assistance in this matter; signed the bid already prepared for her, and acted for and under the direction of the administratrix throughout; that she paid nothing whatever on the purchase price; executed a mortgage on the land for \$2,000, the money thus obtained going directly into the hands of the administratrix and being used by her to discharge the indebtedness of the estate, including a prior mortgage, except only the amounts due to Mrs. Duncan, individually or as administratrix, and within a few months, without ever having gone into possession of the land, or exercised any of the rights of ownership, Mrs. Edmundson deeded all of the land directly to Clara A. E. Duncan, who was still the administratrix, subject to the \$2,000

mortgage above mentioned, without receiving any consideration whatever for such conveyance.

In July, 1900, the administratrix filed a final account, showing a balance on hand of a little more than \$800 and forty-one acres of land, for distribution between herself and her adopted daughter. On August 11, 1900, this account was approved by the court, and \$412.50, and an undivided one-half interest in the forty-one acres of land were distributed to each, and the order further directed that the administratrix be discharged, upon filing vouchers showing such distribution to have been made. No such vouchers were ever filed, and no formal order discharging the administratrix was ever made.

During all this time, and continuing up to the time of Mrs. Duncan's death, the relations between Mrs. Duncan and her adopted daughter were such as may be looked for between an affectionate mother and a dutiful child who are naturally congenial. They lived together at all times, save when the daughter was away at school, even after the daughter's marriage, and except for temporary absences, made their home on the land in question. The mother seems to have assumed to be the directing head and to have managed the farm and transacted all of the business, without explaining details to the daughter or consulting her to any extent. The daughter testified, in effect, that soon after the death of Mr. Duncan, she realized that she had some interest in the ranch, but no one ever explained to her what that interest was, and she never inquired; knew nothing of the community laws of this state, or of the law of descent, and trusted to her mother to protect her interest in all things; that she never even heard of the sale in the probate matter until after her mother's death, and apparently she assumed, at all times, that

Jan. 1922]

Opinion Per TOLMAN, J.

her interest in the property remained exactly as it vested in her upon the death of Mr. Duncan.

Appellant brought this action after her mother's death, which occurred in 1919, to recover an undivided one-half of the three hundred and ninety-four acres of land, title to which Mrs. Duncan sought to acquire through the probate proceedings, hereinbefore referred to, asking a judgment for \$40,000, the alleged value of the use of her lands wrongfully received by her mother, and further demanding a judgment against her mother's estate for \$24,000, alleged to be the value of her one-half interest in the one hundred and sixty-one acres of land not sold in probate, which tract was conveyed to one Broughton, in 1903, for a consideration of \$4,830, received by the mother, but never accounted for by her in any way. From a judgment below denying her any relief, she appeals.

The learned trial court seems to have been influenced largely in arriving at his judgment by the statute of limitations, and the thought that appellant was guilty of laches in not sooner discovering what had been done in the probate of her father's estate, and thereupon promptly and properly asserting her rights. There would be considerable strength in this position had it been shown that the daughter was ever separated from the mother, or had ever been encouraged to look after her own affairs and transact her own business, or had she been in any degree independent of her mother in financial matters. The contrary, however, is established by the evidence, and by every inference to be drawn from the established or admitted facts. All agree that the mother was a forceful person, inclined to dominate and have her own way, and the conclusion seems irresistible that, at the time when she conceived the idea of getting the title to the real property in her

own name, the daughter being but a child in years, was not, in any manner, consulted or informed. We are clear that the mother then had no idea of wronging the daughter, but thought it safer and better for all concerned that she should be in a position to manage, conserve and increase the property in value to the ultimate benefit of the daughter as well as herself, unhampered by the immature judgment of the daughter, or by the uncertainties which the future might develop, not the least of which was the thought that the daughter might marry, and if she did the husband might secure control of her property, to the detriment of all concerned. The daughter's first marriage proved unsuccessful, and when she was obliged to divorce her husband, the mother, no doubt, considered that she had been fully justified, and became, if anything, still less inclined to tell her daughter the true facts, or vest her with title to any part of the property. What she may have thought of the ability of her daughter's second husband to handle and conserve property, we have no means of knowing, except that by her will she gave the daughter a life estate in the lands only, when probably originally she had no thought other than that the entire property would go to the daughter at her death. Nor is there any showing that any information as to the true facts was brought home to the daughter through any outside sources. The attorney who represented the mother in the probate of the father's estate, in his testimony, indicates quite clearly that he did not consider it necessary to inform the daughter of her rights, or of what was being done, but acted quite naturally in assuming that the mother would inform the daughter, or, at least, would not take any steps inimical to the daughter's interest. Nor does it appear that the guardian ad litem ever gave any information to or in any way consulted with his ward.

Jan. 1922]

Opinion Per TOLMAN, J.

We hold, therefore, that the relations between the mother and daughter, at all times, were clearly such that the statute of limitations did not begin to run until the discovery of the facts by the daughter, after the mother's death, and, for the same reasons, appellant is not properly chargeable with laches.

Upon the principal question of the effect to be given to the purported sale in probate, little need be said, as the facts speak the law. Whether the sale was void or voidable, it is unnecessary to determine, as there are no intervening purchasers in good faith for value; in fact, no intervening purchasers whatever, and if the lessee Lindley acquired any interest it would seem, from his own testimony, that he had full notice and knowledge of appellant's rights. That the administratrix, in fact and in law, became the purchaser at her own sale, cannot be successfully disputed, the evidence to that effect is clear, cogent and convincing.

"The courts did not make the law vesting title in the heirs upon the death of an ancestor, nor did they decree that a child shall take equally with and during the lifetime of a surviving member of a community. Those rights depend upon legislative enactment, and our statutes give to a surviving child an immediate interest of which the courts must take notice.

"An administrator stands in a fiduciary relation to those beneficially interested. He is subject to the universal rule that a trustee is bound to do that which will best serve the interests which for the time are intrusted to his care. His own good faith is not enough." *Stewart v. Baldwin*, 86 Wash. 63, 149 Pac. 662.

See, also, *Dormitzer v. German Savings & Loan Soc.*, 23 Wash. 132, 62 Pac. 862.

So, then, under the law, a one-half interest in her father's estate having vested in the appellant upon his death, the mother's course of action, as here clearly established, although perhaps justifiable from her point

of view, was not binding upon the appellant, and under the facts here shown, she had a right to recover that which she had inherited.

But, notwithstanding this right of recovery, we are of the opinion that she may not recover for mesne profits. So far as the record discloses, the income from the farm managed by the mother was used indiscriminately for the support and pleasure of both mother and daughter. As heretofore stated, they at all times lived together; had everything in common; travelled and spent winters together in California; and nothing is called to our attention tending to show that the entire income from the place was not mutually spent and consumed. Under these conditions, a recovery of one-half of the mesne profits, especially in view of the uncertainty as to what those profits were, would be inequitable.

As to the one hundred and sixty-one acre tract sold to Broughton in 1903, it appears that, while the mother conducted the negotiations and arranged the price and terms of the sale, the daughter, then being of legal age, joined in the deed and must have known, from the fact that the purchaser required her signature, that she had some interest therein, and should have demanded her part of the purchase price. Not having done so within the statutory period, her right of action thereon is now barred.

The judgment appealed from is reversed, and the cause remanded, with directions to enter a decree in accordance with the views herein expressed.

PARKER, C. J., BRIDGES, FULLERTON, and MITCHELL, JJ., concur.

Jan. 1922]

Opinion Per TOLMAN, J.

[No. 16710. Department One. January 20, 1922.]

ALMA DE LA POLE, *Appellant*, v. CHARLES J. BROUGHTON,
JR., *as Administrator etc., Respondent*.¹

VENDOR AND PURCHASER (131, 133)—BONA FIDE PURCHASER—TITLE—CONSIDERATION AND GOOD FAITH—EVIDENCE—SUFFICIENCY. Where mother and daughter, as sole heirs of an estate, joined in a deed to a tract of land belonging to the estate, for which the daughter never received any portion of her share of the consideration, the daughter has no right of action against the purchaser to recover her undivided one-half interest on the theory that he dealt in bad faith, since the purchaser was justified in assuming, when tendered a deed duly executed by mother and daughter, that the mother was authorized to receive that part of the consideration belonging to the daughter.

Appeal from a judgment of the superior court for Columbia county, McCroskey, J., entered July 5, 1921, upon findings in favor of the defendants, in an action by an heir to recover an interest in real property and mesne profits, tried to the court. Affirmed.

S. A. Keenan and *R. M. Sturdevant*, for appellant.

Will H. Fouts and *Roy R. Cahill*, for respondent.

TOLMAN, J.—This case is closely allied to that of *de la Pole v. Lindley*, ante p. 387, 204 Pac. 12, to which reference should be had for a more detailed statement of the facts.

In addition to the relief sought in the *Lindley* case, the appellant, at the time of beginning that action, also brought this action to recover an undivided one-half interest in the one-hundred-and-sixty-one-acre tract of land, sold by her mother to Chas. J. Broughton, Sr., together with the mesne profits for the six years immediately preceding the bringing of the suit. From a judgment denying the relief sought she has appealed.

¹Reported in 204 Pac. 15.

It was stipulated on the trial of the action below that the land here affected was acquired by the Duncans during their married life, and, therefore, it will be assumed to have been community property at the time of the death of John W. Duncan, in 1898, and should have been administered upon in the probate of his estate.

Mrs. Duncan, as administratrix of her husband's estate, first inventoried this land as community property, and thereafter concluding that one hundred and twenty acres of this tract were her separate property, she ceased to administer upon it, and though no order of the probate court was sought or obtained with reference thereto, she thereafter treated it as her separate and individual property. The remaining forty-one acres were admittedly community property, and passed by the decree of distribution entered in the John W. Duncan estate to the widow and daughter in equal, undivided shares.

It is shown that Mr. Broughton was a friend, and to some extent, an adviser of Mrs. Duncan during the years following the death of her husband, and was also a surety upon her bond as administratrix of her husband's estate. It is further contended that the consideration which Broughton paid for the land was far less than its actual value; that his action in immediately building a fence to separate the tract purchased from the remainder of the Duncan ranch, and his failure to see that any part of the consideration reached appellant's hands, all indicate that he dealt in bad faith, and that the sale to him should be held void, notwithstanding the fact that appellant joined with her mother in executing the deed which conveyed the title to Broughton.

But, after a careful examination of the record, we cannot so hold. We see nothing in the friendly rela-

Jan. 1922]

Opinion Per TOLMAN, J.

tions existing between Mr. Broughton and Mrs. Duncan which necessarily placed any special duty or obligation upon the former, or gave to either any special advantage in dealing with the other. After agreeing upon the price, Mr. Broughton demanded an abstract of title, and upon its examination, he was informed that appellant, who had then reached her majority, had an interest in the land, and that he must secure a deed from both mother and daughter. He communicated this fact to Mrs. Duncan, the daughter then being absent from home attending college, and when the mother thereafter produced and tendered a deed, duly executed by both, he had a right to assume that she was authorized to receive that part of the consideration belonging to the daughter, and no duty rested upon him to go farther.

We are clear that the judgment appealed from must be, and it is, affirmed.

PARKER, C. J., BRIDGES, FULLERTON, and MITCHELL, JJ., concur.

[No. 16712. Department One. January 20, 1922.]

ALMA DE LA POLE, *Appellant*, v. TROY LINDLEY,
*Executor, et al., Respondents.*¹

CHARITIES (3, 4)—BEQUESTS—CERTAINTY AS TO BENEFICIARIES AND PURPOSES. A bequest by a testatrix to the "Trustees of the Masonic and Eastern Star Home at Puyallup, Washington," the home being an unincorporated auxiliary of the Masonic Grand Lodge of the state, by whom its trustees were appointed, constitutes a valid gift to charity, though not using the words "in trust," in view of extrinsic evidence showing the charitable work in which the home is engaged, presumably to her knowledge, and no other intent on her part than to give to charity being discoverable from the will.

SAME (3). A bequest to trustees of an institution is a bequest to the institution itself.

SAME (7)—ADMINISTRATION OF FUND. Where the object of a charitable bequest is identified, the court has power to carry out the intended purpose through such legal entity as may be in control of the institution at the time, or, if necessary, through a trustee of its own appointment.

Appeal from a judgment of the superior court for Columbia county, McCroskey, J., entered July 5, 1921, upon findings in favor of the defendants, in an action to contest the validity of a will, tried to the court. Affirmed.

S. A. Keenan and *R. M. Sturdevant*, for appellant.

Will H. Fouts and *Roy R. Cahill*, for respondents.

TOLMAN, J.—Clara A. E. Duncan, the person mentioned and referred to as the widow of John W. Duncan, in *de la Pole v. Lindley*, ante p. 387, 204 Pac. 12, and *de la Pole v. Broughton*, ante p. 395, 204 Pac. 15, to which cases reference is made for further facts throwing light upon the question here presented, died in California, November 26, 1919, being then a resident

¹Reported in 204 Pac. 15.

Jan. 1922]

Opinion Per TOLMAN, J.

of, and leaving an estate in, Columbia county, Washington.

Deceased left a last will, dated March 10, 1919, which was admitted to probate in the superior court for Columbia county on December 27, 1919, and thereafter appellant began a contest of the will on a number of different grounds, only one of which is presented and argued here.

The will, after directing the place and manner in which the testatrix' body should be interred, and bequeathing certain property in Oregon to surviving relatives, proceeds:

"I hereby give, devise and bequeath all the real estate which I may own at the time of my death, in Columbia county, State of Washington, to my daughter Alma de la Pole, for and during the term of her natural life, and upon her death, I hereby give, devise and bequeath the remainder over to the Trustees of the Masonic and Eastern Star Home, at Puyallup, Washington, forever."

The trial court sustained the will and the contestant, appealing, assigns as error the ruling of the trial court sustaining the bequest of the remainder over of the real estate situated in Columbia county to the trustees of the Masonic and Eastern Star Home at Puyallup, Washington, it being contended that the language used in the will to effect this bequest is so indefinite and uncertain as to be entirely void, and that, therefore, the bequest fails, and appellant, as the legally adopted daughter and only descendant of the testatrix, should take this remainder as sole heir at law.

Our chief concern here is to arrive at the intention of the testatrix, which must be ascertained largely from the will itself, and to determine whether the bequest under attack was intended as a charitable bequest, because if it was for charitable purposes the

law requires that it be sustained if it reasonably can be. As was said in *In re Galland's Estate*, 103 Wash. 106, 173 Pac. 740, quoting Gray on the Rule Against Perpetuities:

“ ‘If the court, however, can see an intention to make an unconditional gift to charity (and the court is very keen-sighted to discover this intention), then the gift will be regarded as immediate——’ ”

And this, we think, is the general rule, although it has been occasionally overlooked.

Taking, then, the will as a whole, in order to determine the intention of the testatrix, we find that by paragraph 2 provision was made for the surviving brothers and sisters, and also a nephew. It does not appear that there were other collateral relatives. Paragraph 3, which has been quoted, provides for the daughter, and then follows the bequest to the trustees of the Masonic and Eastern Star Home. Having first provided for all who might be denominated the natural objects of her bounty, the last bequest must be viewed in the light of that fact which was evidently in the mind of the testatrix at the time. It is not shown that she had any knowledge of the individuals who were trustees of the home at the time the will was drawn, or that she possessed any foreknowledge of who might be such trustees when the will should take effect, but it is shown that the Masonic and Eastern Star Home is not an incorporated association, but is a charitable auxiliary of the Grand Lodge of the Free and Accepted Masons of Washington, which is incorporated; that its trustees are appointed from time to time by the Grand Lodge, and that it is maintained by appropriations made directly by the Grand Lodge, and by donations from others, for the purpose of providing a home and support for sick, incapacitated and dependent members of the Masonic order and their wives and daugh-

Jan. 1922]

Opinion Per TOLMAN, J.

ters. It is clear the testatrix knew nothing of the legal machinery from or through which the home derived its existence, and, just as clearly, she did not intend that the trustees who might be such at the time of her death should take individually, but assumed that the institution was, or would be, governed and controlled by trustees, and that the way to have her property applied to the carrying on of the home and the extension of its work, was to place it in the hands of the trustees who should manage its affairs, for that particular purpose. That she did not use the words "in trust" or their equivalent does not, in the light of the extrinsic evidence and the charitable work in which the home was engaged, presumably to her knowledge, render her intent uncertain, for, being "very keensighted to discover this intention", namely, to give to charity, we can quite logically hold here that no other intent can be discovered in the will, and from the known charitable nature of the work carried on by the home in question, the intention to further that work by the bequest must be presumed.

It has frequently been held that a bequest to the trustees of an institution is a bequest to the institution itself: *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502; *New York Institution for the Blind v. How's Ex'rs*, 10 N. Y. 84; *Baldwin's Ex'rs v. Baldwin*, 7 N. J. Eq. 211; *Newell's Appeal*, 24 Pa. 197; *Bruere v. Cook*, 63 N. J. Eq. 624, 52 Atl. 1001.

See, also, *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315, and *Hitchcock v. Board of Home Missions*, 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B 1.

That the Masonic and Eastern Star Home at Pualup is an unincorporated auxiliary of the Masonic Grand Lodge, will not defeat the bequest, for the

object of the testatrix' bounty having been identified, the court will see upon distribution that the property bequeathed is applied to the purpose intended, through such legal entity as may be in control of the home at the time, or, if necessary, through a trustee or trustees of its own appointment. See authorities cited, and *In re Wilson's Estate*, 111 Wash. 491, 191 Pac. 615. The judgment of the trial court is affirmed.

PARKER, C. J., BRIDGES, FULLETON, and MITCHELL, JJ., concur.

[No. 16568. Department One. January 20, 1922.]

FRANK L. BAKER *et al.*, Appellants, v. CENTRAL
METHODIST CHURCH OF SPOKANE, Respondent.¹

CONTRACTS (12)—TERMS AND CONDITIONS—EVIDENCE OF AGREEMENT. Under a contract between an architect and a church building committee whereby he was to be compensated by a commission of one per cent on the estimated cost of a proposed building for his services in helping to select a plan, in case such plan was accepted, the architect is not entitled to compensation for his services where no plan was accepted and the failure to accept a plan is not shown to be arbitrary.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered February 14, 1921, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

O. C. Moore, for appellants.

Lee & Kimball, for respondent.

TOLMAN, J.—Appellants, as plaintiffs below, brought this action to recover \$1,350, as agreed compensation for services rendered, as architects, at the instance and request of the defendant, respondent here. From a judgment denying recovery, they appeal.

¹Reported in 203 Pac. 977.

Jan. 1922]

Opinion Per TOLMAN, J.

It appears that Mr. Vogel, a member of the appellants' firm, learning of respondent's desire or intention to construct a church edifice, visited Spokane, in January, 1920, and met the respondent's building committee. He, and he alone, testifies that he proposed to prepare preliminary sketches, and advise the building committee, for a compensation of one per cent of the estimated minimum cost of the proposed building, such compensation to be payable upon the performance of the services indicated, without reference to whether or not the sketches submitted were accepted. While, upon the other hand, the members of the building committee, some half a dozen or more in number, each testifies that it was clearly understood and agreed that appellants were to be paid the one per cent as compensation only in the event that some one of the sketches submitted was accepted.

Thereafter, on January 26, 1920, the matter having been reported by the building committee to respondent's board of trustees, the latter board made and adopted the following resolution:

"A meeting of the Trustees of the Central M. E. Church was held in the Crescent Tea Room, Monday, at 12 M., on January 26th, 1920, Mr. D. S. Prescott presiding.

"Those present were: Geo. H. Goble, W. H. Matthews, S. Heath, D. S. Prescott, W. S. McCrea and J. H. Ewen.

"The meeting was called upon the request of the Special Committee appointed by the Official Board having in charge the future plans of Sunday School and Church, to consider the advisability of employing an architect to meet with the committee and aid them in coming to definite conclusions for a future program.

"Upon motion of Mr. Goble, seconded by Mr. Heath, that the President and Secretary be authorized to enter into a written contract with Baker & Vogel, arch-

itects, employing them to assist the committee appointed, the remuneration to be one per cent on the estimated cost of accepted sketches and four per cent for supervision as the work progressed, which motion was unanimously carried.

“There being no further business, the meeting adjourned. (Signed) J. H. Ewen,

“January 26, 1920. Secretary.”

Thereafter the clerk of the board of trustees wrote to appellants as follows:

“Spokane, Wash., January 31, 1920.

“Mr. J. H. Vogel,

“Care Baker & Vogel,

“516 Pacific Blk.,

“Seattle, Washington.

“Dear Sir:

“Last Monday, the Trustees met and authorized the Committee to employ you upon the terms and conditions you offered to the committee.

“There is one item that the Trustees want definitely understood, and that is that the one per cent covering the acceptance (accepted) sketches shall constitute remuneration in full, optional with them, as to the balance of your contract. For example, should you prepare sketches that would be accepted on a contract of \$100,000, and one unit of \$25,000 to be constructed at this time, should they find in working with you that they would prefer someone else to supervise the work, that they could do so.

“Kindly forward your contract for our signature so that we may proceed at once with the work. . . .

“(Signed) J. H. Ewen.”

To which appellants replied as follows:

“Baker & Vogel

“Architects. Seattle, Wash., Feb. 2, 1920.

“Mr. J. H. Ewen,

“Arthur D. Jones Bldg.,

“Spokane, Wash.

“Dear Mr. Ewen:

“Your letter of January 31st received. . . . Your letter constitutes a contract as it stipulates that the

Jan. 1922]

Opinion Per TOLMAN, J.

Trustees have voted to employ us upon the terms and conditions we offered to the committee when we were in Spokane, namely to prepare preliminary studies of your proposed building for a fee of 1% of the estimated cost.

“We are therefore hastening to prepare these preliminary studies and hope to be in Spokane within a few days to present same. We have been working on them for several days as we expected to receive this word from you.

“As to the question of general working drawings and specifications and also the question of supervision, we will take that up when we are in Spokane. We will hand you at that time a contract covering the points enumerated in your letter. We agree that it is all right for the Board of Trustees to employ some one else to supervise the construction of each unit as it is built, if they so desire.

“(Signed) Baker & Vogel, Archts.,
“By Joshua H. Vogel.”

It will be seen that the question here presented is one of fact only, namely, what were the terms and conditions offered by Mr. Vogel, of the appellant co-partnership, when he met with the building committee personally in Spokane.

The Ewen letter of January 31 clearly indicates that the compensation was to be paid upon accepted sketches only. The letter in answer, while silent as to the acceptance of the sketches as a condition, indicates no exception to that position, and by the statement, in effect, that the Ewen letter constitutes a contract, upon the terms and conditions theretofore offered, clearly relegates the whole matter to what occurred between Mr. Vogel and the building committee.

The trial court found upon the testimony of six or more against one, that:

“One of the above named plaintiffs met with the special building committee of the above named defend-

ant and discussed with said building committee the matter of furnishing plans and specifications for a new church building of the above named defendant, and at that meeting said plaintiffs proposed that they would submit certain plans and sketches and present them to the defendant and that in case any of said plans and sketches were accepted that the plaintiffs were to receive as compensation therefor, one percent on the estimated cost of the proposed building or structure according to the special plans or sketches accepted, and that in case no plans or sketches were accepted no compensation would be due to the plaintiffs.”

The evidence being overwhelming in favor of the finding of the trial court, we cannot disturb it if we would, and being satisfied that it speaks the truth, we would not disturb it if we could. It appearing, without dispute, that no sketch or plan submitted by appellants was ever accepted by respondent, and it not appearing that the failure to accept was arbitrary, the judgment of the trial court must be, and is, affirmed.

PARKER, C. J., BRIDGES, and MITCHELL, JJ., concur.

FULLEBTON, J., concurs in the result.

Jan. 1922]

Opinion Per MITCHELL, J.

[No. 16825. *En Banc*. January 20, 1922.]

THE CITY OF OLYMPIA, *Respondent*, v. WILLIAM
NICKERT, *Appellant*.¹

EVIDENCE (10)—JUDICIAL NOTICE—ORDINANCES. A city police court may take judicial notice of an ordinance whose violation is charged against defendant without the complaint setting out the ordinance other than by its number.

SAME (1)—JUDICIAL NOTICE—BY APPELLATE COURT. On appeal from a police court on a prosecution for the violation of a city ordinance of which judicial notice is taken by the police court, such ordinance is equally within the judicial knowledge of the superior court to which the appeal is taken.

MUNICIPAL CORPORATIONS (53) — ORDINANCES — PLEADING. Rem. Code, § 291, respecting the manner of pleading a city ordinance applies only in cases originally commenced in courts other than those of the municipality whose ordinance is involved.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered September 13, 1921, upon a trial and conviction of selling intoxicating liquor. Affirmed.

Vance & Christensen, for appellant.

George R. Bigelow and *William W. Manier*, for respondent.

MITCHELL, J.—The defendant was charged with a crime and convicted in the police court of the city of Olympia. The complaint was:

“That one W. Nickert on or about the 1st day of April A. D. 1921, at Room 5, Alden Hotel, within the corporate limits of the City of Olympia, in said county and state, committed the offense of selling intoxicating liquor, to wit: Whiskey all of which is contrary to the form of Ordinance No. 1657 in such case made and provided, and against the peace and dignity of the state of Washington.”

¹Reported in 203 Pac. 946.

He appealed to the superior court, and upon trial before a jury was again found guilty, and from a judgment entered on the verdict has appealed to this court.

The several assignments of error presented by the appeal center in the contention that no cause of action was stated in the complaint because it failed to properly plead the ordinance upon which the action was based, and failure of the prosecution to prove the ordinance, which objections were seasonably presented before and after the verdict in the superior court.

The trial in the superior court was had upon the same complaint as the one used in the police court. The complaint gives the number of the ordinance but contains no statement of its title nor of the date of its passage. It did not follow the requirements of § 291, Rem. Code (P. C. § 8376), on which appellant relies. Section 1260½, Rem. Code (P. C. § 8374), cited by appellant, provides the manner for the proving of city ordinances. The superior court took judicial notice of the ordinance and instructed the jury according to its terms. This, we think, it had the power and right to do. The case of *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053, following the general rule, is authority to the effect that a court of a municipality will take judicial notice of the ordinances of the city and that it is not necessary, in such court, to plead the ordinance by title and date of passage in a criminal complaint charging a violation of the ordinance. See, also, Dillon on Municipal Corporations (5th ed.), vol. 2, § 639, which is the same as § 413, vol. 1, Dillon on Municipal Corporations (4th ed.), cited in the *Pearson* case, *supra*.

Thus, under the complaint in this case, entirely sufficient as against the objection urged, the appellant became familiar in the municipal court with the facts constituting the crime with which he was charged. This is the ultimate purpose of criminal complaints in all

Jan. 1922]

Opinion Per MITCHELL, J.

of the courts. Nor was he less familiar with those facts upon his trial *de novo* in the superior court to which he appealed. The statutes require no other or different pleading for the purpose of the *de novo* trial in the superior court.

In determining the power and duty of the superior court in such situation, notwithstanding some apparent difference of opinion in the authorities, we adopt what is stated in McQuillin on Municipal Corporations, vol. 2, p. 861, to be the "better view" and which is tersely stated in the concurring opinion in *Spokane v. Griffith*, 49 Wash. 293, 95 Pac. 84, as follows:

"As I understand the rule, the appellate court will take judicial notice of any fact that the court of original jurisdiction must judicially notice. Here the ordinance in question was within the judicial knowledge of the police court, and, being so, it was equally within the knowledge of the superior court to which the cause was appealed."

Other authorities to the same effect are: *Smith v. Emporia*, 27 Kan. 528; *Downing v. Miltonvale*, 36 Kan. 740, 14 Pac. 281; *Foley v. State*, 42 Neb. 233, 60 N. W. 574; *Steiner v. State*, 78 Neb. 147, 110 N. W. 723; *Galen Hall Co. v. Atlantic City*, 76 N. J. L. 20, 68 Atl. 1092; *Portland v. Yick*, 44 Ore. 439, 75 Pac. 706, 102 Am. St. 633; *Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373.

Section 291, Rem. Code (P. C. § 8376), relied on by the appellant, must, we think, be held to apply only in cases originally commenced in courts other than those of the municipality whose ordinance is involved.

Affirmed.

ALL CONCUR.

[No. 16684. Department One. January 20, 1922.]

M. C. CHASE *et al.*, *Appellants*, v. W. T. SMITH,
Respondent.¹

PLEADING (53)—GENERAL DENIAL—SCOPE. In an action by a landlord against a tenant for damages at the close of the term, based on the tenant's failure to leave the same quantity of land in summer fallow as existed at the time of entry, the complaint alleging ownership in plaintiffs of such summer fallow, is sufficiently traversed by a general denial as to permit the introduction of evidence showing that neither by the understanding of the parties nor by custom was it incumbent on defendant to leave the same amount of summer fallow on vacating the land.

SAME (196)—WAIVER OF DEMURRER—PLEADING OVER. Error in sustaining a demurrer to a complaint is waived where the plaintiff files an amended complaint.

Appeal from a judgment of the superior court for Whitman county, Mills, J., entered December 23, 1920, upon the verdict of a jury rendered in favor of the defendant, in an action on contract, after a trial on the merits. Affirmed.

Chas. F. Voorhees and *Clyde E. Lacey*, for appellants.

Hanna, Miller & Hanna, for respondent.

PARKER, C. J.—The plaintiffs, Chase and wife, seek recovery of damages alleged to have resulted to them from the violation of the terms of a lease contract by the defendant Smith, under which lease he became their tenant and renter of six hundred and forty acres of land owned by them and situated in Whitman county. A trial upon the merits before the superior court and a jury of that county resulted in verdict and judgment in favor of the defendant, from which the plaintiffs have appealed to this court.

¹Reported in 203 Pac. 985.

Jan. 1922]

Opinion Per PARKER, C. J.

The trial was had upon appellants' amended complaint and respondent's answer thereto. The amended complaint contains a copy of the lease which shows the agreed tenancy to be for the period of one year from October 1, 1916, with the privilege on the part of respondent, at his own election, to continue the term for one, two or three additional years. The only agreed rental is \$3,000 per year, payable in advance on the first day of October of each year of the entire term the tenancy shall run. The lease is the simplest form of a lease of real property with nothing but cash rent reserved. There is nothing in the lease in terms restricting the use of the land by respondent to any particular use or purpose. Indeed, the lease does not even within itself in any manner mention or even suggest the nature or condition of the land; and the only language therein having any reference to the condition the land shall be in upon its surrender at the termination of the tenancy is the following:

"And the said party of the second part [defendant and respondent] further covenants and agrees with the said parties of the first part [plaintiffs and appellants] that at the expiration of the time mentioned in this lease, peaceable possession of the said premises shall be given to said parties of the first part, in as good condition as they now are, the usual wear, inevitable accidents and loss by fire excepted, . . ."

The amended complaint further alleges:

" . . . that said defendant went into possession of said premises under said lease on or about the 1st day of October, 1916, and that the phrase 'in as good condition as they now are' contained in the fifth paragraph of said lease, was used, understood and intended by the parties to said lease, to protect the parties of the first part thereto, the plaintiffs herein, in relation to weeds, and the 240 acres of summer fallow on said premises at the time of the execution thereof.

. . . that at all times herein mentioned there was a general, well established and notorious custom and usage of many years continuance, generally known and acted upon, prevailing in Whitman county, Washington, that a tenant who takes possession of farm land under a farm lease without paying for the summer fallow thereon shall, upon vacating the premises held under such a lease, leave on such premises the same number of acres of summer fallow as were upon the premises at the time the tenant took possession thereof. . . .

“That at the time of the execution of said lease and at the time defendant went into possession of said premises under said lease as aforesaid, there were 240 acres of summer fallow thereon, the property of plaintiffs, and that defendant used and availed himself of said summer fallow without paying anything therefor, and that at the time defendant vacated said premises summer fallow in Whitman County, Washington, in the vicinity of said premises, was reasonably worth the sum of \$15 per acre, and that defendant vacated said premises on or about, to-wit, the 1st day of October, 1919, without leaving any summer fallow whatsoever on said premises, to the damage of plaintiffs in the sum of \$3,600.”

The only prayer of the amended complaint is for judgment against respondent in the sum of \$3,600, interest from the date of the commencement of the action, and costs. Respondent by his answer denies that the words “in as good condition as they now are,” contained in the lease and referring to the premises, were understood by the parties as alleged in the amended complaint; and denies the existence of the custom alleged in the amended complaint; but admits that there were two hundred and forty acres of summer fallow on the land when he went into possession of it under the lease on October 1, 1916. The answer does not in terms deny or admit that this summer fallow was “the prop-

Jan. 1922]

Opinion Per PARKER, C. J.

erty of plaintiffs," as in terms alleged in the amended complaint. This, as we shall presently see, is claimed by counsel for appellants to be an admission of such alleged ownership of the summer fallow, whatever that means. Upon the issues so made the cause proceeded to trial. At the conclusion of the trial, the court submitted to the jury two special interrogatories to be answered and returned with its general verdict; which interrogatories and the jury's answers thereto, returned with its general verdict in favor of respondent, are as follows:

"Do you find that it was agreed between the parties to the lease in question that the phrase 'in as good condition as they now are,' was used and understood by them to mean that defendant should leave as much summer fallow as there was on the land when the lease was made?

"Answer: No.

"Do you find a custom or usage in Whitman county whereby the tenant under a lease with cash rental is required to leave as much summer fallow as was on the land when he leased it?

"Answer: No."

There are a considerable number of assignments of error made by counsel for appellants, and their argument thereon takes a rather wide range. We regard, however, the controlling questions to be rather simple and narrow in scope, and they are as fully stated as the nature of the case requires, in the opening brief of counsel for appellants, as follows:

"There were two and only two issues in the case. First: As to whether or not the phrase 'in as good condition as they now are' contained in the fifth paragraph of said lease, was used, understood and intended by the parties to said lease to protect the appellants in relation to weeds, and the 240 acres of summer fallow in said farm land. Second: As to the existence or non-existence of the custom . . ."

The latter is evidently only incidental to the former.

It is contended in appellants' behalf that "the court erred in conducting the trial on the theory that the ownership of the summer fallow was in issue," and in admitting evidence touching such issue. The argument seems to be, in substance, that appellants' "ownership" of the two hundred and forty acres of summer fallow upon the land at the beginning of the tenancy is an admitted fact in the case because respondent did not in his answer to the amended complaint in terms deny the allegation therein that the summer fallow was "the property of plaintiffs."

We think, however, this allegation of so-called "ownership" of the summer fallow was of such general character that respondent's general denial contained in his answer was sufficient to traverse such general allegation of the amended complaint, if indeed it needed to be traversed as a fact, by the answer. It seems to us, however, that the amended complaint and answer constitute a tender by both appellants and respondent, as questions of fact, of the question of the meaning of the lease contract as understood by the parties at the time of its execution, and incidental thereto the question of the existence of the alleged custom. We think the trial court did not err, to the prejudice of appellants, in proceeding with the trial upon this theory and ultimately submitting to the jury the two special interrogatories above quoted. The words "ownership of the summer fallow," it seems to us, are not very appropriate to describe the claimed contractual obligation resting upon respondent with reference to the summer fallow; but that is evidently what is meant by such "ownership" mentioned in appellants' complaint and brief. Respondent's denials in his answer were, we think, sufficient to negative the claim that he was under any

Jan. 1922]

Opinion Per PARKER, C. J.

obligation, by the express or implied terms of the lease, to leave any summer fallow upon the land at the conclusion of the tenancy. This was the real issue, tendered as an issue of fact.

All other contentions here made in behalf of the appellants, save as to the sufficiency of the original complaint, have to do, in their last analysis, with the claim that the trial court should have decided the whole case in appellants' favor as a matter of law. A review of the evidence convinces us that it was ample to support both the general and special findings of the jury. Looking to the whole record and the unconditional nature of this cash rental lease, we think there is much sounder ground for arguing that the trial judge could have more properly decided the cause as a matter of law in favor of respondent than that he could have decided the cause as a matter of law in favor of appellants.

Contention is made that the trial court erred, to the prejudice of appellants, in sustaining respondent's demurrer to their original complaint. We think, in the light of the whole record, this ruling was in any event without prejudice, and, if erroneous, such error was waived by appellants' filing their amended complaint. The original complaint set up another additional claim of damage to that of failure to return the land to appellants with as much summer fallow thereon as when taken from them by respondent. This other claim of damages made in the original complaint could have been plead as a separate cause of action. Appellants were not prevented from setting up in their amended complaint such claim of damage in addition to the one set up therein as above noticed. Had appellants done this in such manner that the trial court could have ruled upon such claim, apart from the claim which was set up in their amended complaint, they could have obtained

such ruling thereon that, had it been against them, their claim of error thereon could have been properly preserved for such review in this court as they might have deemed themselves entitled to.

The judgment is affirmed.

FULLERTON, MITCHELL, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 16457. *En Banc*. January 21, 1922.]

SUNSET SHINGLE COMPANY, *Appellant*, v. NORTHWEST
ELECTRIC & WATER WORKS, *Respondent*.¹

ELECTRICITY (1, 3)—STATUTORY CONTROL—CONTRACTS FOR POWER AND LIGHT—VALIDITY—DISCRIMINATIONS. A contract by a public service corporation to furnish power for driving mill machinery, electric light for the mill plant, steam heat for its dry kilns, and make repairs to its machinery, in consideration for the transfer by the mill company of its steam plant which was to be used for generating electricity, does not constitute a public service contract, the contract being one for private service, before the dedication of any service to the public.

CONTRACTS (4)—MUTUALITY OF OBLIGATIONS. A contract whereby a mill company transfers its steam plant to an electric company, for which it is to supply fuel in return for electric power and light, cannot be said to be void for want of mutuality because of the possibility of the mill company's ceasing to operate its plant at pleasure, where the contract also provides that, in case of a "shut down" of the mill, the electric company shall have the use of its saws and conveyors for the purpose of supplying necessary fuel.

ELECTRICITY (1, 3)—STATUTORY CONTROL—CONTRACTS FOR POWER—VALIDITY. In a contract calling for the furnishing of fuel to operate a steam plant for the generation of electricity in exchange for electric light and power so generated, a provision that the parties shall render monthly bills to one another for such services, charging an equal amount therefor, is not an admission by the parties that the furnishing of the electricity is a public service, but shows rather the intent of the parties that the contract should not fall within the regulatory provisions of the public service statutes.

¹Reported in 203 Pac. 978.

Jan. 1922]

Opinion Per PARKER, C. J.

DAMAGES (72, 74) — BREACH OF CONTRACT — MEASURE — EXPENSE INCURRED—LOSS OF PROFITS. Under a contract to furnish electricity and steam for a term of thirty-five years, which was breached a few years after it was entered into, the proper measure of damages is the expense of replacing the lost service, the injured party not being entitled to recover damages on the basis of yearly loss of profits for the balance of the term.

SAME (72). A valuation fixed by the parties on a steam plant in a transfer by a mill company to an electric company in consideration for a service of electric light and power for which the plant was to be utilized, is not the proper measure of damages on a breach of the contract by the electric company, but the mill company would be entitled to recover for loss of time and expense in changing back to a steam plant and replacing the electrical machinery which had depreciated in value.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered November 22, 1920, upon findings in favor of the defendant, dismissing an action for damages for breach of contract, tried to the court. Reversed.

W. H. Abel and Chadwick, McMicken, Ramsey & Rupp, for appellant.

Burkheimer & Burkheimer, for respondent.

PARKER, C. J.—The plaintiff, Sunset Shingle Company, commenced this action in the superior court for Grays Harbor county, seeking recovery of damages from the defendant Northwest Electric & Water Works, claimed as the result of a breach of a contract by the defendant. The contract in question was entered into between them on February 3, 1915, looking to the electrification by the defendant of the plaintiff's manufacturing plant, the construction of a steam electric plant by the defendant on ground to be conveyed to it by the plaintiff, from which the defendant was to furnish to the plaintiff electric power to operate the machinery of its plant, and also steam heat to

operate the dry kilns of its plant. The damages claimed by the plaintiff were for its loss from the diminished output of its plant during the years 1918 and 1919 because of the defendant's failure to furnish power in quantity as agreed; for its loss for the failure of the defendant to furnish steam heat in quantity as agreed to efficiently operate its dry kilns, in that the shipping weights of its products were not reduced to normal weights, resulting in the necessity of paying excessive freight rates in the marketing of its products; expenses it was compelled to incur for repairs to certain of its machinery, which under the contract it was the duty of the defendant to make; and depreciation of the value of its mill plant because of the change of its power from steam to electricity as the result of the contract.

The defendant by its answer denied that it had failed in any respect to do all that it was required to do by the terms of the contract, and denied that the plaintiff suffered any damages as the result of any such failure. These denials were followed by affirmative defenses set up by the defendant, which are in substance that it is a public service corporation "furnishing electricity for light, heat and power for hire to the city of Montesano and its inhabitants"; that the service agreed to be rendered to the plaintiff is a public service; that the contract therefore is void because the agreed charge therefor constitutes an undue and unreasonable preference as against the public service customers of the defendant in violation of the regulatory provisions of our public service statutes. The cause was tried before the court sitting without a jury, and resulted in findings, conclusions and judgment made and rendered in favor of the defendant, denying to the plaintiff recovery in any amount; the trial judge concluding as matters of law that the con-

tract "was made in violation of the statutes of the state of Washington" and "is void and of no effect." Following the findings and conclusions upon which the judgment was rested, the trial judge further found:

"(1) That the plaintiff performed the contract on its part. To which defendant excepts and exception allowed.

"(2) That the defendant breached the said contract upon its part and because of the defendant's said breach the plaintiff suffered loss and damage in the sum of \$67,764.32. To which defendant excepts and exception allowed."

These findings were evidently made to the end that they might become the basis of a judgment to be rendered in favor of the plaintiff in the event of this court holding upon appeal that the contract, the breach of which is claimed as a basis of recovery by the plaintiff, is a valid and binding contract upon the defendant. The plaintiff, seeking reversal of the judgment, and the rendering of a judgment awarding to it damages in accordance with the findings of the trial court, above quoted, has appealed to this court.

There seems to us to be no room for serious controversy as to what we deem to be the controlling facts of the case, in so far as the validity of the contract in question is concerned. The involved nature of this problem, however, renders it necessary that we make a somewhat extended and comprehensive statement of facts. Appellant has been a corporation of this state ever since long prior to entering into the contract in question, and from about the year 1907 up until the time of the commencement of this action in November, 1919, has owned and operated a large shingle manufacturing plant, manufacturing shingles therein and marketing them therefrom upon a somewhat extensive scale. Its plant has at all times been located near the

city of Montesano, in Grays Harbor county. Up to a short time following the entering into of the contract, the power and heat necessary to operate appellant's mill machinery and dry kilns were supplied by its own auxiliary steam plant constituting a part of its general plant.

Respondent has been a corporation of this state ever since the year 1912. Speaking generally, it may be said to be a public service corporation, in that its articles of incorporation indicate that to be its principal business, and in that its principal business since some years prior to entering into the contract here in question seems to have been the furnishing of electric light to the city of Montesano and its inhabitants in pursuance of a franchise granted by that city. It seems that respondent may have then furnished power, other than for light, to industrial and other plants in the city, though the record does not show to what extent such power had been so furnished. The record is silent as to respondent ever furnishing power to any person or corporation outside the city, other than to appellant and two other concerns; one being a machine shop, and the other being a certain gravel plant. The record does not inform us just how or where respondent acquired its electric energy which it furnished to the city and its inhabitants up to the time of entering into the contract; though up to that time and since then respondent seems to have been possessed of a generating electric plant some miles distant from the city.

About January, 1915, respondent's representative approached appellant's representative with a view of entering into negotiations looking to the electrification of appellant's plant and the construction by respondent, upon ground to be furnished by appellant, of a

Jan. 1922]

Opinion Per PARKER, C. J.

steam generating electric plant; to the end that such steam electric plant, to be operated by respondent, should be furnished with fuel from appellant's mill, and electric power be furnished from such steam electric plant for the running of appellant's mill and steam heat to operate its dry kilns; it being contemplated that respondent would thereby be enabled to produce electric power from such plant in excess of that which would be necessary to operate appellant's mill and dry kilns, to the end that such additional power might be disposed of by respondent at a profit.

The foregoing, we think, is a fair statement in substance of the respective conditions we find these parties in when they entered into the contract on February 3, 1915. To the end that we have clearly before us the controlling purpose of that contract and just what each of the parties agreed to do, we quote therefrom, so far as we deem necessary for our present inquiry, as follows:

"This contract by and between Sunset Shingle Company, of Montesano, Washington, the first party, and Northwest Electric & Water Works, of the same place, the second party, Witnesseth:

"The general object of this contract is to provide for the electrification of the first party's shingle mill in Montesano, and operation by electricity generated and furnished by the second party, and the construction and operation of a steam electric plant at Montesano by the second party on land to be acquired by it from the first party near the said shingle mill; and all the details hereof are to be construed in the light of that general object.

"The first party, in consideration of the undertakings of the second party herein, agrees that it will, as hereinafter provided, sell, convey and transfer to the second party the following: [Here follows specification in detail of the property, consisting of one-half

acre of land near appellant's plant, and the machinery and equipment of appellant's steam plant.]

"All of the foregoing land and chattels are estimated by the parties at the value of Thirty-five Hundred Dollars. . . .

"In consideration of the foregoing, the second party agrees that:

"The second party will, with all convenient speed, construct upon said parcel of land a modern steel electric power house and plant of a total capacity of six hundred (600) horsepower, which plant shall consist of: [Here follow specifications.]

"The second party will also simultaneously with the construction of the said plant, or immediately after the same is finished, deliver and transfer to the first party, and install in its mill, the following electrical apparatus for operating its mill: [Here follows specification of electrical apparatus so to be furnished and installed.]

"The second party will furnish from its electric plant to said mill all electric current needed for operation of said mill, including lights, and whether said mill shall be operated eight hours, or more, per day not to exceed nineteen (19) hours per day, that is, omitting the five hours from six P. M. to eleven P. M., unless the parties shall otherwise agree. The second party agrees that it shall furnish such current of sufficient voltage and frequency to operate the first party's mill efficiently and without dragging, provided that the first party's machinery is kept in good operative condition. The second party will also from time to time inspect and keep in good order at its expense, the electrical equipment in the first party's mill, but the first party is, at its expense, to furnish lamps in its mill.

"All mill waste produced from the first party's mill whatever shall be delivered over said conveyors to the second party for its use, and the second party shall store such thereof as it shall not immediately use, and accumulate a surplus for use during any time of shut down of the mill.

"The second party shall charge the first party for the current furnished to it according to its filed and

Jan. 1922]

Opinion Per PARKER, C. J.

published tariff of rates, as the same now is, or at any future rate as the same may be approved by the Public Service Commission, or other authority of the state; and shall also make a charge for the steam furnished to the dry kiln according to a steam tariff to be filed and published by it. Such charge shall include steam and current for lighting furnished at night or other hours of the day when the mill is not running, but is not 'shut down' in the usual sense. Monthly bills for such service of current and steam shall be rendered in the usual way. The first party shall also charge and render monthly bills to the second party for all the fuel furnished to the second party as aforesaid, and shall charge therefor the same amount as shall be charged for the same period of time by the second party for its current and steam. At any time that the mill shall be 'shut down', and not in operation any hour of the day, and the first party shall desire the second party to supply it with steam or with current for lighting, the second party shall render a monthly bill for such current to be metered and charged for at the regular tariff rate, and shall also render a bill for steam charged at its steam tariff rate. But in the event of a 'shut down' as aforesaid, the first party shall receive credit from the second party as paid by fuel already furnished for the first week of any such 'shut down', and shall pay the monthly bill less said week's credit.

"In the event that the mill shall be 'shut down', and the second party shall exhaust its store of mill waste fuel, and desires to continue to use wood fuel instead of oil fuel, it shall have the use of the saws in the first party's mill without charge, but at its expense for material, current and labor, in order to produce wood fuel for use in its furnaces. The second party shall provide sufficient storage capacity for all surplus fuel produced by the mill, and not immediately used, and shall store the same and use it as needed; but if the mill in its operation does not produce enough fuel either at its present or any enlarged capacity, to operate the second party's plant to its full initial capacity, then the first party shall pay the second

party at the rate of One Hundred Dollars (\$100) per month for such time as the second party is compelled by the shortage of such fuel to produce additional fuel, either wood or oil, at its own expense, provided that in event of shut down of said mill this provision shall not apply for longer than one week's time in each shut down.

"All the provisions of this contract shall apply in behalf of the first party to any enlargements of its present plant up to the capacity of double the present plant; but it shall be optional with the second party whether it will enlarge its plant sufficiently to provide current for any larger capacity of the first party's mill than double its present capacity.

"This contract shall remain binding upon the parties, and upon their respective assigns and successors owning or operating said respective mill and electric plant, during the continuance of the present electrical franchise of the second party, that is, until August 31, 1950, inclusive.

"All of the foregoing electrical equipment to be furnished and installed by the second party at its expense in the first party's mill, is agreed by the parties as having a total value of Thirty-five Hundred Dollars, not including the wiring of the mill for lighting, which is to be at the first party's expense.

"It is also agreed by the second party that it will at its expense connect with the second party's plant, and with the first party's water mains, the large pump above mentioned, which is now in use at the first party's mill for fire protection, and will at all times keep said pump in operative condition ready for instant use by the first party in case of fire at the first party's mill. . . ."

Appellant has timely done all things agreed by the terms of the contract by it to be done. Respondent in due time constructed its steam electric plant, and we assume for present purposes has timely done all things agreed by it by the terms of the contract to be done; except the furnishing of sufficient electric power to

properly drive the machinery of appellant's plant during the years 1918 and 1919, the furnishing of sufficient steam heat to properly operate appellant's dry kilns during the years 1915 to 1919, inclusive, and the keeping in repair during the years 1918 and 1919 of the electric motors and pumps in appellant's plant. It was the failure on the part of respondent to fully perform the contract in these particulars that constitutes the basis of the trial judge's findings that, because of such failure on the part of respondent, appellant has suffered loss and damage in the sum of \$67,764.32, though concluding, as a matter of law, that appellant could not recover such damage because of the invalidity of the contract.

The evidence, we think, clearly shows that all of the power, light and heat service rendered by respondent to appellant was from respondent's steam electric plant, constructed in pursuance of the terms of the contract; that the contract contemplated that all power, light and heat service to be rendered by respondent to appellant should come solely from that steam electric plant; that that steam electric plant was well capable of furnishing all the electric energy and steam heat required by the terms of the contract to be furnished; and that the failure of respondent to furnish electric energy and steam heat in the full measure required by the terms of the contract was caused by the respondent diverting power generated by that plant, in violation of the terms of the contract, to the supplying of its customers in the city of Montesano.

The theory upon which respondent's affirmative defenses and the trial court's judgment are rested is, in substance, that the contract is void and of no binding effect upon respondent because respondent is a public service corporation, because the contract is for the

rendering of a public service by respondent, and because the contract provides for such compensation for the service as in effect constitutes an unlawful discrimination in favor of appellant as against respondent's public service customers, in violation of the provisions of our public service statutes.

We may concede for present purposes that respondent is, generally speaking, a public service corporation; that is, that its principal business is rendering public service to the city of Montesano and the inhabitants thereof in furnishing electric energy for light, and that as to such service it is subject to the regulatory provisions of our public service statutes as to uniformity of rates charged and quality of service rendered. But it does not follow that every act and thing done by respondent, even though it be in a sense service rendered to a person or corporation in compliance with the terms of some contract made by it with such person or corporation, is a public service subject to the regulatory provisions of our public service statutes. In controversies such as this, the question is not so much as to whether or not the corporation is a public service corporation—a general term often of very loose application when discussing public service problems—but whether or not the service in question is a public service. Manifestly our public service statutes and the administration of them have to do only with public service rendered by corporations engaged therein. Therefore let us not be led astray by the fact that respondent is, generally speaking, a public service corporation; but direct our inquiry to the question of whether or not the service here in question, agreed to be rendered to appellant by respondent, is a public service. If it is not, then plainly the contract in question does not fail of its

binding force upon respondent because of the provisions of our public service statutes.

Now, looking alone to those things here in question which by the terms of the contract respondent was to do, which could be characterized as service to be rendered by it to appellant, we find that respondent agreed to furnish: electric power for driving appellant's mill machinery; electric light for appellant's plant; steam heat for operating appellant's dry kilns; and repairs to appellant's machinery. We think it needs no argument to demonstrate that neither the agreeing to furnish steam heat for the dry kilns, nor the agreeing to make repairs to appellant's machinery, was the agreeing to render a public service to appellant. It seems to us equally plain, under our decisions and under the circumstances here shown, that the agreeing to the furnishing of electric power for the driving of the machinery of appellant's mill was not the agreeing to render public service to appellant. It has been repeatedly held by this court that the furnishing of electric or other power for the driving of machinery of industrial or other plants is not the rendering of such a public service as will sustain the exercise of the power of eminent domain looking to the acquisition of property to be put to such use. *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 4 Ann. Cas. 987, 2 L. R. A. (N. S.) 842; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 7 Ann. Cas. 748, 5 L. R. A. (N. S.) 672; *State ex rel. Tolt Power etc. Co. v. Superior Court*, 50 Wash. 13, 96 Pac. 519; *State ex rel. Shropshire v. Superior Court*, 51 Wash. 386, 99 Pac. 3; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199; *State ex rel. Public Service Comm. v. Spokane & I. E. R. Co.*, 89 Wash. 599, 154 Pac. 1110.

Assuming for argument's sake only, that a corporation may so dedicate its property to the furnishing of electric power to the public for purposes other than light, so as to make such furnishing of power a public service subject to the regulatory provisions of our public service statutes; we are still quite convinced that what might be here termed such a dedication of this steam electrical plant was at all events subject to appellant's rights under the terms of the contract. Those rights were acquired and reserved to appellant as against this very steam electric plant as well as against respondent generally, at the time of the coming into existence of the plant. Indeed, this steam electric plant was constructed for and in a sense dedicated to the service of appellant's plant before the public could possibly have acquired any rights therein by virtue of the dedication of that plant by respondent to the furnishing of power to the public as a public service. In other words, the service to be rendered by this steam electric plant which in any sense could be said to be dedicated to the public, was the service which it might be able to render to the public after the service rendered which appellant was entitled to under the terms of the contract, which we think never has been dedicated to the public service and hence remains a private service. The decisions of the California supreme court in *Del Mar Water, Light & Power Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948, and *Mound Water Co. v. Southern California Edison Co.*, 184 Cal. 602, 194 Pac. 1014, lend strong support to this conclusion.

The facts of this case to our minds render it readily distinguishable from our decisions in *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559; and *Raymond Lumber Co. v. Raymond*

Jan. 1922]

Opinion Per PARKER, C. J.

Light & Water Co., 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C 574. The *Cowley* case involved a pure public service contract in its inception; that is, the carrying of passengers by a common carrier. The *Raymond Lumber Co.* case also involved a pure public service contract in its inception; that is, the furnishing of water by a public service water company from its property and sources already dedicated by it to public service.

The furnishing of light to appellant's plant presents a problem which may be said to be somewhat differently conditioned from the furnishing of power and steam, in that light service might support the exercise of the power of eminent domain; but there still remains the fact that this light service was to and did come from a source not dedicated to public service. However, there is no claim here made by appellant that there was any failure on the part of respondent to furnish light. Indeed we are not advised by this record as to how the execution of that portion of the contract was considered by the parties as being influenced by the regulatory provisions of our public service statutes.

Some contention is here made that the contract in question is void for want of mutuality of obligation. This contention seems to be rested upon the possibility that appellant might at its pleasure close and cease the operation of its plant, and thus not furnish to respondent any fuel for the operation of its steam electric plant. But a casual reading of the contract will disclose that there would still remain the obligation on the part of appellant to furnish to respondent the use of its saws and conveyors for the cutting and conveying of fuel to respondent's steam electric plant; and besides we find in the contract that appellant's conveyors were extended and changed at its own expense for the express benefit of respondent in the conveying to its plant

of fuel therefor. Our decisions in *Sultan R. & Timber Co. v. Great Northern R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020; and in *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381, seem to us decisive of this contention in appellant's favor.

No contention is made that the contract in question is void as being *ultra vires* in the light of respondent's powers enumerated in its articles of incorporation. We note, however, that those enumerated powers do seem to strongly suggest that respondent was organized for the sole ultimate purpose of rendering public service. This contract, however, was manifestly entered into by respondent with a view of promoting and extending its public service; but that does not argue that its contractual obligations to appellant under this contract are public service obligations. Those obligations to our mind were no more public service obligations on the part of respondent, in the light of the circumstances in this case, than would be its obligation to pay for some piece of machinery or appliance which it might purchase looking to the increasing and betterment of its facilities to perform its public service obligations.

We have not lost sight of the provisions of the contract valuing the steam machinery and appliances constituting appellant's plant which were transferred by it to respondent, and the electrical machinery and equipment furnished and installed in appellant's plant by respondent, each at the sum of \$3,500. Just what the purpose of this fixing of values by the terms of the contract was, we confess is not made very certain, though it does suggest that such valuations show that appellant's plant remained of the same value as before the change, viewed apart from the service to be rendered by each to the other. Nor have we lost sight of the statement made in the contract that monthly bills shall be rendered by respondent to appellant for power

Jan. 1922]

Opinion Per PARKER, C. J.

and heat at current rates, and that appellant shall render to respondent monthly bills for fuel furnished, charging an equal amount therefor. This latter provision may have been prompted by the parties foreseeing a possibility that the contract would fall under the ban of the regulatory provisions of the public service statutes; but we do not construe them as an admission by either party that the contract does fall under such ban. Reading the contract as a whole, and observing the manner of commingling the several obligations of each party to the other, we are unable to see that any one or more of the things to be furnished or done by each party was intended as a separate consideration for any one or more of the things to be furnished or done by the other party; but are of the opinion that all that was to be furnished and done by one party, in law became a single consideration for all that was to be furnished and done by the other party. So viewing the contract, we conclude that it became binding and enforceable as against respondent, and that a breach of its terms by respondent rendered respondent liable in damages to appellant to whatever extent such breach may have caused such damage.

A reading of the evidence has convinced us that the trial court correctly found that appellant performed the contract on its part; and that respondent breached the contract, resulting in damage to appellant; though we can not agree with the trial court as to the proper measure or amount of such damage. It is contended by counsel for respondent that there can not be applied to appellant's damages any lawful rule of measurement, because of their inherent nature and uncertainty, especially insofar as such damages are rested upon claimed loss of profits. While the trial court found that appellant was damaged in the sum of \$67,764.32 by reason of respondent's breach of the contract, the finding does

not show what items of damage the court had in mind in making up this total. That, however, is readily ascertained from the record before us. The items of damage claimed by appellant in its bill of particulars, which in effect became an amendment to its complaint, are as follows:

Loss on diminished shingle cut during 1918.....	\$5,717 52
Loss on diminished shingle cut during 1919.....	42,893 61
Loss by reason of expense repairs to pumps.....	301 00
Loss in under-weights by reason of lack of steam.....	7,943 50
Loss by reason of expense repairs to motors.....	848 19
Loss by reason of depreciated value of mill at time of sale	22,000 00
	<hr/>
	\$79,703 82

In the remarks of the trial judge found in the statement of facts, announcing his finding touching the amount of damage suffered by appellant, it is made plain: that the judge awarded the damage claimed by appellant by reason of the diminished output of its mill in the years 1918 and 1919 in the amount claimed by appellant, less fifteen per cent thereof; that the judge awarded the damage claimed by appellant by reason of its expense in repairing the motors and pumps in its plant in the amount claimed by appellant; that the judge awarded the damage claimed by appellant by reason of the lack of steam heat to be furnished by respondent in the amount claimed by appellant less thirty-three per cent thereof; and that the judge awarded the damage claimed by appellant for depreciation of the value of its mill plant, by reason of the change from steam to electric power, in the sum of \$20,000; which items aggregate the total of \$67,764.32 which the judge found appellant to be damaged by reason of the breach of the contract by respondent. Appellant at all times in question had a large, profitable and well-established manufacturing business, with a ready market for all that its plant was capable

of producing, running at its full capacity, when furnished with adequate power and heat.

The items relating to "diminished shingle cut" and "under-weights," we understand, are concededly claims of damages resting upon the theory of loss of profits. We think the evidence is sufficiently certain touching such loss, as found by the trial judge, insofar as the rule of damage for loss of profits is applicable thereto under the circumstances of this case; but we do not think that rule is applicable to the whole of these items, covering the whole period within which they are claimed to have accrued. If appellant's theory upon which these claims of loss are rested were to be carried to its logical conclusion, appellant could, without effort on its part, looking to the mitigating of such damages, let them run on during the entire term of the contract, which does not end until 1950; and enforce successive recoveries thereon, within periods of the statute of limitations for the bringing of actions, amounting in the aggregate to its entire loss of profits covering that long period; even though the breach of the contract on the part of respondent should be a denial of all obligations thereunder immediately after it was entered into. It seems to us that this cannot be the law controlling the respective rights of these parties upon this branch of the case. Now we think there arrived a time when the breach of the contract by respondent became so flagrant as to, in effect, give notice to appellant that it would no longer be bound by the terms thereof insofar as the furnishing of power, steam and repairs is concerned. When appellant became so advised, we think it was then obliged to proceed, in the further protection of its rights, upon the theory that the contract, in those respects at least, was completely breached; and that thereafter appellant's

damage, if any, suffered because of such breach, was measurable not by loss of profits, but by the expense of putting its plant in such condition, as to machinery and appliances, as would enable it to proceed in its manufacturing business as advantageously as it could have proceeded had respondent not so breached the contract. On the other hand, we think that, prior to appellant's being so advised, and during the period when respondent was serving appellant in a measure, but not fully, as contemplated by the contract, and under such circumstances as to lead appellant to believe that such service would be presently improved so as to fully comply with respondent's obligation under the contract, appellant's loss of profits resulting from want of such proper service under the contract would be a proper measure of damage. It seems plain to us that during such a period appellant was fully warranted in not undertaking to make a change in the equipment of its plant, but was warranted in assuming that the service it was entitled to receive under the contract would be presently forthcoming in full measure from respondent.

It is very difficult, in the light of this record, for us to say with certainty just when the contract was so completely breached by respondent, touching the service in question, as to advise appellant that it could no longer expect proper service from respondent in the future. We think, however, that the evidence warrants the conclusion that, at the close of the year 1918, such a turning point in the relations of appellant and respondent occurred; and therefore conclude that loss of profits resulting from "diminished shingle cut" and "under-weight" accruing before that time constitute a proper measure of appellant's damages as to those items. We adopt approximately the trial court's find-

ing upon the loss by reason of the "diminished shingle output" prior to the close of the year 1918, and so fix appellant's recovery upon that item at \$4,800. As to appellant's loss by reason of "under-weights" prior to the close of the year 1918, we conclude that it is entitled to recover \$2,500.

As to the loss by reason of expense incurred by appellant in repairing pumps and motors which respondent should have repaired, we adopt the finding of the trial court, and so fix appellant's recovery upon those items at \$1,149.

The claimed loss to appellant by reason of the depreciation of the value of its mill plant, flowing from the change from steam to electricity, is somewhat problematical. We have seen that the value of the steam machinery and appliances taken over by respondent from appellant, and the value of the electric machinery and appliances installed in the mill by respondent, are agreed to be the same, to wit, \$3,500. Viewed superficially, this may seem to suggest that the mill plant was not thereby depreciated in value in any amount. But when we remember that appellant would necessarily be at considerable expense and loss of time changing the plant back to a steam plant, necessitating the replacing of the electrical machinery therein, which had become of some considerable age, the conclusion must be that appellant can not put its plant in as good condition as it is entitled to have, as against respondent, except at a considerable expenditure of time and money; that is, the mere balancing of the agreed valuations of \$3,500 would not save appellant harmless. Appellant is entitled to recover damages from respondent on this item in the sum of \$3,000. This may seem to be an award not certainly proved, but respondent, we think, is not in posi-

tion to complain of such an award, when such damage is necessarily only an approximation as to amount; it being certain as to its substantial character, and flowing from respondent's wrongful breach of the contract.

The judgment is reversed and the cause remanded to the superior court with directions to enter a judgment in the sum of \$11,449 in favor of appellant Sunset Shingle Company and against respondent Northwest Electric & Water Works.

FULLERTON, TOLMAN, HOVEY, and HOLCOMB, JJ., concur.

[No. 16598. Department Two. January 23, 1922.]

CHARLES T. WRIGHT, *Appellant*, v. TUNIS HEYTING,
Respondent.¹

DEEDS (13, 16)—EXECUTION IN BLANK—AUTHORITY TO CHOOSE GRANTEE—DELIVERY—SUFFICIENCY. Where a deed was duly executed with the name of the grantee in blank and delivered to another with authority to elect who should be the grantee, the fact that the grantee selected by the agent was directed to write his own name in the deed as grantee, was merely the doing of a physical act and not a delegation of authority to choose the grantee.

CANCELLATION OF INSTRUMENTS (6)—FRAUD. The wrongful act of an agent, delegated with authority to fill in the name of a grantee left blank, in expending the money procured by him from the grantee, is not ground for setting aside the deed by the grantor.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered January 6, 1921, in favor of the defendant, in an action to set aside a deed, tried to the court. Affirmed.

James P. Stapleton, Thomas Mannix, and Guy L. Wallace, for appellant.

Wilson T. Hume and L. E. Crouch, for respondent.

¹Reported in 203 Pac. 935.

Jan. 1922]

Opinion Per PARKER, C. J.

PARKER, C. J.—The plaintiff, Wright, seeks a decree setting aside a deed purporting to convey land owned by him and situated in Clarke county to the defendant Heyting. A trial upon the merits in the superior court for that county resulted in a denial of the relief sought and the rendering of a judgment accordingly; from which Wright has appealed to this court.

It is first contended in Wright's behalf that the deed is void and ineffectual to convey the land to Heyting, because of its being signed, acknowledged and delivered by him to one Crouch with the space for the name of the grantee left blank; and Crouch, while authorized to elect who should be the grantee and insert such grantee's name in the deed, exceeded his authority in that behalf, in that he authorized Heyting to write his own name in the deed as grantee, and thereby unlawfully delegated his (Crouch's) authority to insert the name of the grantee in the deed. The record before us renders it plain that Crouch did not delegate to Heyting the right or power to choose or decide who the grantee should be, but only directed Heyting to do the physical act of writing his own name in the deed as grantee, in the consummation of a sale of the land by Crouch, representing both himself and Wright. Had Crouch, with his own hand, written Heyting's name in the deed as grantee, it seems plain that the deed so completed would have effectually conveyed the land to Heyting, apart from the question of fraud presently to be noticed. Our decision in *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081, wherein the question is reviewed at some length, clearly calls for such a conclusion. Had Crouch sought to delegate to Heyting the authority to choose who the grantee in the deed should be, there would be ground for arguing

that to be an unwarranted delegation of authority by Crouch to Heyting; but we think that, since Heyting did no more than the physical act of writing his name in the deed by the express direction of Crouch, the legal effect was the same as if Crouch himself had, with his own hand, written Heyting's name in the deed as the grantee. Observations made in *Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470, and *Guthrie v. Field*, 85 Kan. 58, 116 Pac. 217, 37 L. R. A. (N. S.) 326, are in harmony with this conclusion. We conclude that the deed did not become ineffectual to convey the land to Heyting because of want of lawful execution and delivery.

It is further contended in behalf of Wright that Crouch sold the land to Heyting for a price and upon terms materially different from those which he was authorized by Wright to sell the land; and that Heyting, knowing of such violation of duty on the part of Crouch, in legal effect aided Crouch in committing a fraud upon Wright, and so unlawfully deprived him of legal title to the land. This contention presents nothing but a question of fact which the trial judge was compelled to decide upon sharply conflicting oral testimony. We deem it sufficient to say that we have painstakingly read the evidence as furnished us in the statement of facts and are quite convinced that it does not preponderate against the trial court's conclusion. Indeed, it seems to us that Wright had practically as much to do with the agreeing upon the terms and consideration of the sale to Heyting as did Crouch. Much of the testimony related to the manner in which the money paid by Heyting to Crouch for the deed was thereafter expended by Crouch, it being agreed between Wright and Crouch that Crouch should receive the money and expend it for certain purposes to their

Jan. 1922]

Statement of Case.

mutual benefit. Whatever may have been wrongfully done by Crouch in the expending of the money after the execution of the deed, as against Wright, it seems plain to us that Heyting was in no way responsible therefor.

The judgment is affirmed.

HOLCOMB, MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16820. Department One. January 23, 1922.]

C. E. HAND, *Appellant*, v. SCHOOL DISTRICT No. 1 of WALLA WALLA COUNTY *et al.*, *Respondents*.¹

SCHOOLS AND SCHOOL DISTRICTS (21, 25) — POWERS OF DISTRICT BOARD—TEXT BOOKS—VOTE OF ELECTORS—STATUTES — CONSTRUCTION. Under Rem. Code, § 4509, subd. 10, it is mandatory upon school boards in districts of the first class to furnish free text books to the pupils, when so ordered by vote of the electors of the district.

SAME (25, 30)—TEXT BOOKS—POWER TO INCUR INDEBTEDNESS—STATUTES—CONSTRUCTION. A construction of a statute requiring free text books and supplies to be furnished pupils, on vote of the electors, as mandatory would not authorize the incurrence of debt beyond the constitutional limit, since the electoral authorization must be construed as in effect only so long as it may lawfully be carried out.

SAME (25, 30). Injunction will lie to prevent a school board from selling such school books as it has on hand which are suitable for use in the schools, where free school books have been authorized by popular vote.

COSTS (3)—DISCRETION OF COURT. The matter of costs being entirely within the discretion of the trial court where the judgment was not wholly in favor of one party, a denial of costs to either party cannot be assigned as error.

Cross-appeals from a judgment of the superior court for Walla Walla county, Mills, J., entered August 2, 1921, favorable in part to both plaintiff and defend-

¹Reported in 203 Pac. 940.

ants, in an action to compel the district board to furnish free text books to schools, tried to the court. Reversed.

John C. Hurspool, for appellant.

John F. Watson, for respondents.

BRIDGES, J.—The decision of this case requires the construction of certain provisions of the public school code.

That code divides school districts into classes, and the respondent school district No. 1 of Walla Walla is concededly of the first class. At an election held in the district in December, 1911, the electors voted for the furnishing of free school books and supplies to those attending the schools. Thereafter the district directors carried out the expressed wishes of the people. In June, 1921, the school board, on its own motion, called another election, and again submitted the same question to the people of the district, who again voted for free books and supplies. Shortly after that election the board made an order that the school district, "continue to supply free text books and supplies to the children of the grade schools of said district, but that the district discontinue the supplying of free text books, and, so far as practicable, free supplies, to the children attending the high schools of said district, and that the high school district books now on hand be disposed of by sales directly to the children attending the high school." Plaintiff brought this action, seeking to require the defendants to furnish all the pupils of the district with free text books, and enjoining the sale of books then on hand. The complaint sets out the facts as we have stated them, and further alleged that, unless enjoined, the board of directors would carry out its order. The answer was practically an admission of

Jan. 1922]

Opinion Per BRIDGES, J.

the material allegations of the complaint. The plaintiff moved for judgment on the pleadings, and the court, in making its judgment, recited that the questions submitted for determination were three, to wit: "(a) Whether § 4509, Rem. & Bal. Code, is mandatory or permissive as to the furnishing of free text books; (b) whether the directors of said high school district may lawfully sell and dispose of high school text books now on hand belonging to said district; and (c) the application of ch. 170, Laws of 1921, to general or special elections in school district No. 1."

The court, in its judgment, refused to compel the defendants to furnish free text books and supplies, holding that they "may or may not provide free text books and supplies for children attending school in such district as in their judgment, and in the exercise of their discretion, they deem to be for the best interest of the school district." On the second proposition, the court's judgment enjoined and restrained the defendants from selling or disposing of the text books on hand, so long as the same should be suitable for use and required for school purposes. On the third proposition, the court held that ch. 170, Laws of 1921, p. 665, relative to elections is applicable to the defendant school district. It will be noted that the court's judgment is partly in favor of both parties to the action. The plaintiff has appealed and the defendants have cross-appealed.

The chief question we find it necessary to discuss is, may the school board, after the people have voted for free school books and supplies, in its discretion, refuse to furnish them, or any part of them.

In 1909, the legislature enacted a full and complete school code for the state. Section 2, ch. 4, art. 2, Laws of 1909, p. 285, of that code is with reference to the

powers and duties of school boards, and subd. 7 of that section reads as follows:

“To provide free text books and supplies to be loaned to the pupils of the school, when in their judgment the best interests of their district will be subserved thereby, and to prescribe such rules and regulations as they shall deem necessary to preserve such books and supplies from unnecessary damage.” Laws of 1909, p. 286; Rem. Code, § 4481.

Section 16, ch. 4, art. 3, p. 293, of the same act gives additional general powers to school boards in districts of the first class, and subd. 10 of that section reads as follows:

“To provide free text books and supplies for all children attending school, when so ordered by vote of the electors. . . .” Laws of 1909, p. 294; Rem. Code, § 4509.

It should be noted that the first section from which we have quoted is with reference to the powers of the directors of all school districts, regardless of class, and the section from which we have last quoted is with reference to additional powers given to school boards in districts of the first class.

The appellant contends that, under subd. 10, last quoted, the board must furnish free school books, provided the vote of the people is to that effect; while the cross-appellant contends that, under that subdivision, the board still has discretionary power. We are convinced appellant's position must be sustained. Subdivision 10 is to the effect that the board, in school districts of the first class, shall have power to provide free text books, “when so ordered by vote of the electors.” The pleadings clearly show that the people of the district have so ordered. It was not necessary to enact subd. 10 in order to give the board discretionary power in this regard, because subd. 7, first quoted,

Jan. 1922]

Opinion Per BRIDGES, J.

gives all the discretion required or contended for. If, under subd. 10, the board still has discretionary power, what would be the use or purpose of holding an election to determine whether free school books should be furnished? If, after the people have voted for free books, the board may still in its discretion refuse to furnish them, then the election is a useless expense and trouble. The board did not need the authority of the people at an election to give it authority to furnish free books. That authority was given by subd. 7, *supra*. The provisions of subd. 7 are found in nearly all of the previous school codes, but subd. 10 is found only in the 1909 code. The manifest purpose of subd. 10 is to deprive the school board of discretionary power, provided the people of the district order free school books to be furnished.

But cross-appellant argues that, if we construe subd. 10 as mandatory, then we are bound to construe all of the other subdivisions of § 16, *supra*, as being mandatory, and thus the code would be unworkable. To hold, as we do, that, when the people have voted for free school books, it is mandatory that the board furnish them, does not affect, or make mandatory, the remainder of the subdivisions of that section.

Cross-appellant expresses apprehension of evils to result from the construction which we have given to subd. 10, because the board might be required to go beyond its constitutional debt limit in order to furnish free text books voted by the people. Manifestly, the board would not be required, nor permitted, to violate constitutional or statutory limits of indebtedness in order to comply with the demand of the people, for that demand must be construed as being in effect only so long as it may lawfully be carried out. As to the suggestion of cross-appellant that once the board is required to furnish free school books there is no way

of changing that practice, it is sufficient to say that the question of free school books may be at any time submitted to the people, and thus any previous action nullified.

It is further contended, however, that the election in June of 1921, when the people ordered free books to be furnished, was illegal because of ch. 170, Laws of 1921, p. 665, with reference to the time of holding elections, the contention being that that chapter applies to school districts, and that the election was held at a time other than that provided by that chapter. It is not necessary for us to determine whether this 1921 election was held at a time and in a manner provided by law. It is conceded that the 1911 election was valid, and at both of the elections the people voted for free books, and if the 1921 election should be wholly void, then the act of the people in the 1911 election would be controlling. It is, therefore, unnecessary to construe ch. 170, Laws of 1921.

The only other question involved is whether or not the board of directors should be enjoined from selling the high school text books. It is conceded that those now on hand are a proper kind to be used in the high school. Inasmuch as we have held that the board must furnish such books, it would naturally follow that it should be enjoined from selling the books which it already has. We therefore hold that, since the people of the district have voted for free school books, it is mandatory that the school board furnish them, and that the board should be enjoined from selling such books as it has on hand which are suitable for use in the schools.

Appellant complains that the judgment of the court provided that neither party should be required to pay the costs of the other. The judgment was not wholly

Jan. 1922]

Statement of Case.

in favor of the plaintiff, and, under the decisions of this court, the matter of costs was entirely within the discretion of the trial court.

The judgment is reversed, and the cause remanded for proceedings in accordance herewith.

PARKER, C. J., FULLERTON, and TOLMAN, JJ., concur.

[No. 16604. Department Two. January 23, 1922.]

SPOKANE MERCHANTS ASSOCIATION, *Appellant*, v.
RICHARD KOSKA *et al.*, *Respondents*.¹

FRAUDULENT CONVEYANCES (14)—SALES IN BULK—WHAT CONSTITUTES. Under Rem. Code, § 5299, a sale of a one-half interest in a business and stock of goods constitutes a sale in bulk.

SAME (14)—AFFIDAVIT AS TO CREDITORS—LIABILITY OF PURCHASER. A purchaser of a one-half interest in a business and stock of goods, by exacting the affidavit as to creditors required by Rem. Code, § 5296, is not thereby excused from compliance with the mandate of Id., § 5297, requiring the vendee to see that his purchase money for the half-interest is applied, share and share alike, to the payment of bona fide claims against his vendor as shown by the verified statement of creditors.

SAME (14). A purchaser of an interest in a business is liable under the bulk sales law, for debts listed in his vendor's affidavit, but only to the extent of a pro rata part to each creditor of the amount received by the purchaser from the sale.

Appeal from a judgment of the superior court for Grant county, Smith, J., entered March 17, 1921, dismissing an action on accounts, tried to the court. Reversed.

Dodds & Dodds, for appellant.

N. W. Washington and *C. G. Jeffers*, for respondents.

¹Reported in 203 Pac. 969.

HOLCOMB, J.—Appellant, as assignee of several vendors of goods, wares and merchandise to Richard Koska, brought this action against Richard Koska and Joe Beasley individually, and the partnership consisting of Richard Koska and Joe Beasley, upon seven causes of action, totaling \$1,270.23.

On June 2, 1920, after all of the indebtedness sued upon had accrued, respondents entered into an agreement which, after the formal parts, is as follows:

“Witnesseth; that whereas the party of the first part has this day sold to the party of the second part a one-half interest in his stock of trade, good will and business, and assigned a half interest in a certain lease, and has leased to second party a half interest in the furniture, dishes, and fixtures used or in any manner connected with first party’s business at Soap Lake, and as a part of the said deal it is hereby agreed, that the second party shall have management of the said business and shall have the handling of all funds of the said business, and that second party shall deposit all of the receipts of said business in the First National Bank, and shall pay the same out only by check, and on each check it shall be stated the purpose for which the payment was made; and at the end of each month a settlement shall be had as follows: all expenses shall be first paid, and then the money shall be divided into two parts and out of the part belonging to the first party the second party shall first deduct such amount as second party sees fit to pay all sums advanced by second party, to pay one-half of the purchase price of all stock now on hand that is this day still owing; and after all of the said one-half is fully paid, then the one-half that would be coming to first party shall be delivered to the first party.

“All divisions to be had at the said bank.

“It being further agreed that each of the parties are to devote their entire time to the said business.”

On the same day the parties executed and acknowledged an assignment of lease whereby Koska assigned

Jan. 1922]

Opinion Per HOLCOMB, J.

to Beasley a one-half interest in and to the premises occupied by the business at Soap Lake, and a one-half interest in all the furniture, dishes, fixtures, etc., contained in the building.

At the same time Beasley demanded and received from Koska a sworn statement, which is as follows:

“Statement of persons that Richard Koska owes, together with the amount and addresses of each.

Wenatchee Bottling Works, of Wenatchee....	\$82.00
Brown & Hale Candy Co., of Wenatchee, Wash.	67.17
Meadowmore Cream Co., of Wenatchee, Wash.	14.00
Wenatchee Print Co., of Wenatchee, Wash....	37.00
Hershaw & Bloxom, of Wenatchee, Wash.....	26.53
Imperial Candy Co., of Seattle, Wash.....	99.30
True Blue Biscuit Co., of Seattle, Wash.....	108.00
I. N. McGrath, of Ephrata, Wash.....	70.20
National Grocery Co., of Tacoma, Wash.....	173.57
Carsteen Packing Co., of Spokane, Wash.....	32.67
Pacific Biscuit Co., of Seattle, Wash.....	165.00
John W. Graham & Co., of Spokane, Wash....	17.28
Graham Manufacturing Co., of Spokane, Wash.	327.00
Commercial Imp. Co., of Seattle, Wash.....	108.35
Wenatchee Creamery Co., of Wenatchee, Wash.	164.10
Wm. Yeuler, of Soap Lake, Wash.....	38.60
Mrs. Brittain, of Soap Lake, Wash.....	70.28
National Cash Register Co., —, Ohio.....	245.00
First National Bank of Ephrata, Wash.....	1100.00
Woodbury Lumber Co., of Soap Lake, Wash..	400.00
Bradbury of Yakima, Wash.....	135.00

“State of Washington }
 “County of Grant } ss

“Richard Koska being first duly sworn, on oath says that the foregoing statement contains the names of all of the creditors of myself together with their addresses and the amounts set opposite each of said names is the amount now due and owing or that will become due and owing by myself to such creditors, and that there are no creditors holding claims due or which shall become due for or on account of goods, wares or merchandise purchased upon credit or upon account

of money borrowed to carry on the business of which the said goods are a part other than as set forth in said statement or in this affidavit are within the personal knowledge of this affiant.

“Richard Koska.

“Subscribed and sworn to before me this 2nd day of June, 1920.

“William Clapp,

“Notary Public for said state, residing at Ephrata, Wash.”

Five of the accounts sued upon, amounting to \$746, appear in the foregoing list of creditors to the amount of \$649, as listed. The account of the Gray Manufacturing Company, which is one of the accounts assigned and sued upon in this action, it is claimed by appellant, was erroneously named the “Graham Manufacturing Company,” and that that was an error of the scrivener; but of that there is no evidence.

Beasley took possession on June 2, and remained in possession of the business at Soap Lake until August 3, 1920, when he sold the business to the First National Bank of Ephrata for \$750, and applied the money he received from the sale to the payment of debts other than those sued upon herein, and did not apply the proceeds thereof to the creditors, share and share alike.

Koska had disappeared some time previously. Koska was also operating a bakery and lunch counter under his own name and as Koska & Son, at Ephrata, Washington, during the same time until he disappeared.

The trial court dismissed the action with prejudice for the reason that the plaintiff had failed to establish any cause of action, holding that the bulk sales law did not apply, and that the defendant Beasley was a partner in a limited sense only; that his liability

Jan. 1922]

Opinion Per HOLCOMB, J.

could not be enlarged so as to hold him liable for the purchase of goods which were not shown to have been on hand and in the stock at the time he took possession of the Soap Lake business on June 2, 1920.

Respondent urges that appellant could not recover in the form of action brought, and that it could not hold respondents under the sales in bulk law.

Section 5299, Rem. Code (P. C. § 7751), is in part as follows:

“Any sale or transfer of a stock of goods, wares or merchandise, or all or substantially all, of the fixtures and equipment used in and about the business of the vendor, out of the usual or ordinary course of business or trade of the vendor, or whenever substantially the entire business or trade theretofore conducted by the vendor, shall be sold or conveyed *or whenever an interest in or to the business or trade of the vendor is sold or conveyed*, or attempted to be sold or conveyed, shall be deemed a sale or transfer in bulk in contemplation of this act: . . .” (Italics ours.)

It is manifest that, under the contract between respondents, an interest in or to the business and trade of the vendor was sold and conveyed to Beasley, and therefore, under the clear language of the above statute, the transaction fell within the purview of the sales in bulk law.

Beasley demanded and required the affidavit required by § 5296, Rem. Code (P. C. § 7748), but did not comply with § 5297 (P. C. § 7749), which requires that the vendee shall pay or see to it that the purchase money for the property is applied to the payment of the *bona fide* claims and the creditors of the vendor as shown upon such verified statement, share and share alike, and by the same section, having failed so to do, it is provided that the transfer shall, as to such creditors, be fraudulent and void.

The trial court thought that, because it was not shown that any of the goods on hand as a part of the stock in trade were goods which were purchased by Beasley to the extent of a one-half interest on June 2, 1920, therefore he could not be held liable either as a partner or under the bulk sales law. But the agreement was made in view of the bulk sales law and obligated him to pay the items, at least share and share alike or *pro rata*, which were specified in the affidavit which was necessary under the bulk sales law, and this he failed to do. Almost the entire evidence was given by Beasley as a witness for both parties. He was very frank and it is apparent that he purchased the half interest in the business in good faith, and innocent of any intention to defraud any of the creditors; but that situation is of no avail to him when he failed to comply with the mandate of the bulk sales statute. We have held that the bulk sales law applies to any creditors whether the goods are furnished for the particular business or not; *Eklund v. Hopkins*, 36 Wash. 179, 78 Pac. 787; and we have held that an action may proceed directly against the purchaser of the interest which is to be deemed a sale in bulk under the statute. *Friedman v. Branner*, 72 Wash. 338, 130 Pac. 360.

Respondent Beasley cannot be held liable, however, as an individual, for any of the debts incurred by Koska except those listed in the bulk sales affidavit, and then only for the *pro rata* part to each of the amount received by him from the sale, which was \$750, to comply with the statute requiring creditors to be paid share and share alike.

Upon these considerations the judgment must be reversed. It will be remanded to the trial court with permission to appellant to identify its claim which is listed in the name of the Graham Manufacturing Com-

Jan. 1922]

Opinion Per HOLCOMB, J.

pany, of Spokane, Washington, so that it may be entitled to recover that claim if properly proven.

Remanded with instructions.

PARKER, C. J., MACKINTOSH, and HOVEY, JJ., concur.

[No. 16753. Department Two. January 23, 1922.]

WOODLAND STATE BANK, *Respondent*, v. WILLIAM
McKEAN, *Appellant*.¹

BILLS AND NOTES (119, 136)—CONSIDERATION—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. In an action on a promissory note to which the defense is interposed that it was given as an accommodation note without consideration, the burden of proof is upon the maker, and a finding by the trial court on conflicting evidence will not be disturbed on appeal, where the evidence does not preponderate against the finding.

Appeal from a judgment of the superior court for Cowlitz county, Kirby, J., entered May 15, 1921, in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

Miller, Wilkinson & Miller, for appellant.

McKenney & Fisk, for respondent.

HOLCOMB, J.—This action was instituted to recover the sum of \$1,000 and interest, alleged to be due upon a promissory note given by appellant to respondent, of date June 20, 1919, and for the foreclosure of certain securities alleged to have been given to secure the payment of the note.

Appellant, by answer, admits the giving of the note, but denies that any consideration was received by him for the note; denies that any collateral was deposited to secure the note; and for a further answer, alleges

¹Reported in 203 Pac. 939.

facts tending to show that the note was originally given as an accommodation to respondent for a debt of an insolvent corporation by the name of the Lewis River Tie Company, which was indebted to respondent in the sum of \$4,000, upon representations made by one Plamondon, who was receiver for the insolvent corporation and also president of respondent, that, in order to enable him as receiver to issue receiver's certificates against the insolvent corporation covering the expenses of the receivership, it would be necessary for respondent to have the note held by the bank against the insolvent corporation taken out of the bank and appellant's note, with others, substituted in lieu thereof, with the understanding that the note so given by appellant was merely for the purpose of enabling the receiver to negotiate the certificates to the bank, and that the note given by appellant was merely an accommodation, and not to be considered as a binding obligation, or of any force or effect, and that he would never be required to pay it.

Respondent, for a reply to this affirmative answer, averred affirmatively that, to enable the bank to purchase the certificates, it was necessary that the bank should dispose of the note held by it against the insolvent corporation, and that appellant, with others, agreed to purchase the bank's note by purchasing a receiver's certificate for \$1,000, and transferring the receiver's certificate to the bank in payment of the note, and that the bank loaned to appellant \$1,000 with which to purchase the receiver's certificate.

Upon these issues the case was submitted to the court, and judgment rendered in favor of respondent, from which judgment this appeal is prosecuted.

Appellant having admitted the execution and delivery of the note sued upon, the burden was upon him,

Jan. 1922]

Opinion Per HOLCOMB, J.

under the affirmative answer, to prove that the note was without consideration. The evidence is conflicting. Appellant testifies positively that he gave the note without consideration as its basis, and under an agreement that he was not to be called upon to pay it. On the other hand, the testimony for respondent is that appellant borrowed the money from the bank to pay for a receiver's certificate, which was issued and delivered to him, and which was afterwards, in due course, paid. Appellant made the original note on December 21, 1918, for \$1,000. It was due on a specific date, and when it became due, appellant called at the bank, paid the interest on the note, and gave a new note in renewal of the original. This transaction we consider a contradictory circumstance to his testimony that he was not to be called upon to pay the note and assumed no liability in signing it.

The trial court having found for respondent contrary to appellant's affirmative defense, we cannot find that there is sufficient evidence or circumstances to preponderate against the trial court's findings, and must therefore concur with them.

The judgment is affirmed.

PARKER, C. J., BRIDGES, MAIN, and HOVEY, JJ., concur.

[No. 16844. *En Banc*. January 23, 1922.]

A. DAWSON, *Appellant*, v. AUGUSTA L. GREENFIELD *et al.*, *Respondents*.¹

EASEMENTS (12)—IMPLIED GRANTS—WAYS IN GENERAL. Where a deed to part of a tract of land contained a clause following the warranty reciting "and a road 30 feet wide from Lebbe county road to the premises above described," nothing more than an easement was granted for a right of way which existed by implication, since there was no other means of access to the county road.

SAME (12). An easement of a way by implication will pass to the grantee of a parcel of an entire tract of land if it is necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made.

APPEAL (133)—PRESERVATION OF GROUNDS—PLEADINGS—AMOUNT OF RECOVERY. The relief sought by plaintiff in his complaint limits his recovery on appeal, where he made application for a larger amount and subsequently withdrew it in the court below.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered October 25, 1920, in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Reversed.

R. F. Dotsch and *Ben S. Sawyer*, for appellant.

Vance & Christensen, for respondents.

HOVEY, J.—This is an action for the foreclosure of a mortgage upon certain acreage in Thurston county, Washington, wherein the appellant is mortgagee and the respondent Augusta L. Greenfield, formerly Augusta L. Johnston, is mortgagor. Respondent Ira Greenfield is the present husband of the mortgagor.

The property was conveyed by the mortgagee to the mortgagor on October 28, 1915, by a deed of general warranty containing the following words at the conclusion of the warranty clause: "And a road 30 feet

¹Reported in 203 Pac. 948.

Jan. 1922]

Opinion Per HOVEY, J.

wide from Lebbe county road to the premises above described." The purchase price of the property was slightly in excess of \$3,000, and at the time of the transaction the purchaser borrowed from a third person the sum of \$1,400, of which \$1,300 was paid to the grantor, and gave the mortgage in suit for the principal sum of \$1,635 in payment of the balance of the purchase price.

Respondents defended upon the ground that the appellant agreed to furnish a road to the premises described in the deed, and alleged that he had failed to do so, and prayed that the appellant's action be dismissed and that he be enjoined from proceeding to foreclose the mortgage.

The trial court found that the language in the deed referred to was that "of promise and condition and not in warranty, and that the terms and conditions contained in the deed had not been carried out", and entered a decree dismissing the action and enjoining the plaintiff from disposing of the mortgage until the securing and construction of a road appurtenant to the premises described in the complaint.

Respondents were permitted, over the objection of the appellant, to introduce evidence to the effect that there was an undertaking or agreement on the part of the appellant to supply a road for the use of the premises conveyed, and that the language above quoted in the deed was intended to be an express undertaking to accomplish this purpose.

It appears from the testimony that the land in question was a part of a large tract owned by one Hillman at the time conveyance was made to appellant, and that at that time the premises herein involved were connected with an established county road by a road running across a forty-acre tract of land, and all included within the holdings of Hillman. It further appears that the appellant, while he owned the land, and the

respondents, since they have acquired it, have continued to use this road without any interruption or hindrance, and there was no showing that any one was now attempting to interfere with such use. We will assume, without deciding, that this defense can be interposed in an action of foreclosure.

The testimony on this issue on behalf of the respondents consisted principally of that of the respondent Augusta L. Greenfield. She testified that, at the time the deal was made, she demanded that she be supplied with a road and that appellant agreed to give her one, and that she withheld \$100 of the purchase price for three different reasons, dependent upon the portion of her testimony that is considered. In one place she says that it was withheld until such time as appellant would supply the road; in another place she said it was withheld to reimburse her for the cost of moving; and in another place she says it was an oversight on the part of the attorney who handled the transaction. She is corroborated by one witness to the effect that there was something said about her having a road. Nowhere is there any definite testimony to the effect that the respondent was to receive anything more than the easement for a road which was appurtenant to the premises purchased, and, from the testimony, she did receive such easement. When the land was deeded by Hillman to the appellant, an easement for this road arose by implication.

“Where the owner of an entire tract of land or of two or more adjoining parcels employs a part thereof so that one derives from the other a benefit or advantage of a continuous and apparent nature, and sells the one in favor of which such continuous and apparent quasi easement exists, such easement being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication.” 19 C. J., p. 914.

Jan. 1922]

Opinion Per HOVEY, J.

We find two cases from this court where the question has arisen. In *Malsch v. Waggoner*, 62 Wash. 470, 114 Pac. 446, the right to an easement by implication was denied unless there was an absolute necessity, but the doctrine of this case was modified by *Schumacher v. Brand*, 72 Wash. 543, 130 Pac. 1145, wherein it is decided that an easement will be implied if it is necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made.

In this case, the testimony shows that the tract in question has no other means of access to the county road, and the grant is implied under either of our previous decisions. We do not consider it necessary to pass on the question whether the testimony relative to the clause in the deed was properly admitted, for, as we view this deed, these words were merely descriptive of an easement passing with the land, and under the facts of the case they did not add anything to the rights which she obtained by the balance of the deed.

Appellant asks in this court for the reformation of his mortgage and for the increase of the amount recovered by the \$100 retained by the mortgagor at the time the land was purchased. This relief was not asked in his complaint, and although he made a motion to this effect upon the trial and obtained such relief from the lower court, he afterwards withdrew his application and asked to have the pleadings stand as they were in the first instance, and this right was granted by the court. He is not in a position on this appeal to increase the amount of recovery.

The judgment of the lower court is reversed, with directions to enter a decree of foreclosure as prayed, including a reasonable sum as attorney's fees, less the sum of \$12 which, it appears from the testimony, the

respondent has paid in excess of the first year's interest.

All concur.

[Nos. 16728, 16729, 16730. Department One. January 23, 1922.]

WILLIS R. BIRGE *et al.*, *Respondents*, v. IVAN CUNNINGHAM, *Appellant*.

CHARLES W. HATTON, *Respondent*, v. IVAN CUNNINGHAM, *Appellant*.

FRED STAVOSKY *et al.*, *Respondents*, v. IVAN CUNNINGHAM, *Appellant*.¹

WATERS AND WATER COURSES (92)—IRRIGATION—ASSESSMENTS—REDEMPTION—PERSONS ENTITLED TO REDEEM. A landowner's association, formed to look after the individual interests of a large number of owners of property within an irrigation district extending through three counties, may properly redeem the lands of a member from sale for delinquent irrigation assessments where such action is either authorized or ratified by the landowner, since the act of the association is not the intermeddling of a stranger.

SAME (92)—SALE OF LAND—RETURN AND RECORD—STATUTES. Where a county treasurer as ex-officio treasurer of an irrigation district sells lands within the district to satisfy delinquent assessments, his failure to file a duplicate certificate of sale in the office of the county auditor of the county in which the land is situated, as required by Rem. Code, § 6442, invalidates the sale, since the filing of such certificate in the proper county is an essential element of the sale.

Appeal from judgments of the superior court for Yakima county, Taylor, J., entered January 8, 1921, in favor of the plaintiffs, in actions to quiet title to real property, tried to the court. Affirmed.

Cordiner & Cordiner, for appellant.

Stephen E. Chaffee and *R. John Lichty*, for respondents.

¹Reported in 203 Pac. 954.

Jan. 1922]

Opinion Per MITCHELL, J.

MITCHELL, J.—These three cases are similar so far as the questions for decision are concerned. The suits were brought to quiet the owners' title to real property the defendant claimed to own by virtue of deeds of purchase at the sale of the property for delinquent assessments due the Horse Heaven Irrigation District. There were judgments for the plaintiffs, and the defendant has appealed.

Two features of the cases are controlling and enough to be considered. The irrigation district embraces lands within the counties of Yakima, Benton and Klickitat. The property involved in these suits is in Yakima county. It was assessed by the irrigation district for the year 1916, and upon the assessments becoming delinquent, the treasurer of Benton county, as ex-officio treasurer of the irrigation district purporting to follow the statutory plan (which provides no judicial proceeding), attempted to sell the property to satisfy the delinquent assessments. The property was struck off to the appellant's grantor at the treasurer's sale. Upon the expiration of the period for redemption, the purchaser made application to the treasurer for deeds to the property. They were refused and the purchaser advised that the Horse Heaven Land Owners' Association (a voluntary unincorporated company) had redeemed the property for the owners within the statutory period. The purchaser at the tax sale refused the redemption money, and by proceedings in court, wherein neither the landowners nor the Horse Heaven Land Owners' Association, or any of its officers or members was a party, compelled the treasurer of Benton county to issue deeds to him.

In our opinion, the redemption was effective. The landowners' association was formed and maintained to look after the individual interests of the large number of owners of property within the district during

the organization of the district and the troublesome war times immediately following. It held frequent meetings, it seems, in Benton county (the home of the irrigation district's activities), at which as many as fifty of its members were often present. Its members contributed money that was used for its purposes, although not until the present time had it redeemed property from delinquent tax assessment sales for its members. On this occasion the president and secretary-treasurer of the landowners' association looked after the redemption of this and a quantity of other lands situated within the district that had been sold at the tax sale. The payment of the redemption money was made by the bank check of the secretary-treasurer of the landowners' association as such. The president and secretary of the association both testified there was no purpose or intention on their part by the payments to attempt to acquire any interest in or lien upon the lands for the benefit of the association or themselves, but that it was done only and solely for the benefit of the owners. The property owners, respondents here, although they had not requested the president and secretary of the landowners' association to make the redemption for them (in fact, it does not appear that they, living elsewhere than the county in which the tax sale had been attempted, knew that the sale had been made), promptly ratified what had been done for them and repaid the landowners' association the money furnished in making the redemptions.

There is no quarrel with the authorities cited by appellant upon the subject of redemption that "a mere stranger cannot meddle with it. . . . Unless this rule were established it is evident that any third person who might suppose a tax purchaser to have secured a good bargain could relieve him of it and ap-

Jan. 1922]

Opinion Per MITCHELL, J.

appropriate its benefits to himself by simply paying the redemption money." The president and secretary of the landowners' association were not officious intermeddlers. They were not trying to appropriate any benefits to themselves, but were only looking after the personal interests of others for whom they were acting, and whose acts in so doing were promptly ratified by such others.

Again, in support of the judgment: Section 6442, Rem. Code (P. C. § 3223), as to how sales shall be conducted, among other things, provides:

"After receiving the amount of assessments and costs, the county treasurer must make out in duplicate a certificate, dated on the day of sale, stating (when known) the names of the persons assessed, a description of the land sold, the amount paid therefor, that it was sold for assessments, giving the amount and year of the assessment and specifying the time when a purchaser will be entitled to a deed. The certificate must be signed by the treasurer and one copy delivered to the purchaser, and the other filed in the office of the county auditor of the county in which the land is situated."

Certainly, the provision is important to one whose land within the district is situated in a county different from that one in which the sale is made, and it is undisputed a substantial part of the provision was not complied with in these cases. Indeed, no attempt was made to comply with it. It is argued by the appellant, however, that his deed, compelled by a law suit in which the owner was not a party, is conclusive against this alleged irregularity because of the latter portion of § 6445, Rem. Code (P. C. § 3226), that the treasurer's deed is conclusive evidence of all the proceedings from the assessment, inclusive, up to the execution of the deed. (It is confessed by appellant the statute

should be construed as if it read "all the *other* proceedings, etc.") We take no occasion to consider here whether the legislature has the power, in face of the requirement of due process of law, to say that a tax deed issued by a collector or other administrative officer may be sufficient to close the mouth of a property owner who has not been given his day in court by the details of the operative statutes at some time prior to the issuance of the deed. The omission of the treasurer of Benton county complained of here—the failure to file a duplicate of the certificate of sale of these lands with the auditor of Yakima county—pertains to the making of the sale itself. "The report or return of the officer who has made a tax sale, setting forth his doings and the particulars of the sale, is an essential element of the sale." 37 Cyc. 1364. Section 6445, Rem. Code (P. C. § 3226), says the deed is *prima facie* evidence that "(5) At a proper time and place the property was sold as prescribed by law and by the proper officers." Naturally the question arises, what need is there of a statute which provides that a tax deed is *prima facie* evidence of an antecedent step if, upon showing in a given case such step was not taken, it may still be successfully contended the deed is valid?

The return of sale, or filing a duplicate of the sale with the county auditor, in this class of cases is not analogous to the return upon an execution, where the authority of the officer is derived from the judgment and execution. The return is necessary in order to enable the owner to determine upon his course of action, and as it is beneficial to him that a return should be made, that return becomes an important prerequisite, and unless it is made in the mode prescribed by law, no title can pass to the purchaser at the sale. *Landis*

Jan. 1922]

Opinion Per MITCHELL, J.

v. Vineland, 61 N. J. L. 424, 39 Atl. 685; *Martin v. Barbour*, 140 U. S. 634, 35 L. Ed. 564; 37 Cyc. 1365.

“The statute contemplates that the treasurer’s report of sale shall be filed with the clerk. When so filed it operates as notice to all parties concerned. Compliance with the statute is essential to the validity of the sale.” *Jenkinson v. Auditor General*, 104 Mich. 34, 62 N. W. 163; *Judevine v. Jackson*, 18 Vt. 470.

Similar in principle is the case of *Albring v. Petro-nio*, 44 Wash. 132, 87 Pac. 49, which was a case of the sale of real property to pay an assessment levied against it for a public improvement. The statute required the certificate of purchase to be recorded in the auditor’s office, and also required that the holder, during the period of redemption, pay all taxes and public charges against the property, whether the same be for state, county, city or town purposes. It was held the statute must be strictly construed. The holder of the certificate never paid any general taxes during the period of redemption, of which the court said:

“We think one purpose of this provision for the payment of such taxes by the holder of the certificate, is to furnish an additional means of actual notice to the owners of the property that the assessment has been levied, that the preliminary sale has been made, and that the certificate has been issued, so that they may obtain such actual knowledge in ample time to redeem.”

So it is in these cases. The statute provides that property sold to pay an assessment of an irrigation district may be redeemed within two years, Rem. Code, § 6444. The requirement that the treasurer of the county, who, as ex-officio treasurer of the district, makes a sale, shall file a duplicate certificate thereof with the auditor of the county in which the land is situated, has for its purpose the imparting of actual no-

tice to the owner of the property that a sale has been made and a certificate thereof issued, so that he may obtain by this valuable means such important knowledge in ample time to redeem.

Affirmed.

PARKER, C. J., FULLEBTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16669. Department One. January 23, 1922.]

*In re Local Improvement Assessments in the Town
OF GRANDVIEW.¹*

MUNICIPAL CORPORATIONS (258, 260) — IMPROVEMENTS — ASSESSMENTS—TIME FOR FILING OBJECTIONS—HEARINGS. Under Rem. Code, § 7892-21, providing that property holders desiring to object to assessments for sewer construction by a municipality shall file their objections in writing with the clerk thereof prior to the date fixed for hearing by the council, such objections not filed prior to the date set for hearing are nevertheless timely made where the original hearing is adjourned to a later date, and the objections are filed prior to the adjourned hearing.

SAME (260)—IMPROVEMENTS—ASSESSMENTS—OBJECTIONS. Objections to an assessment for the construction of trunk and lateral sewers filed with a town council, though containing many things foreign to the inquiry on appeal before the superior court, were sufficient where they raised objections that the assessments were not levied according to special benefits, that they amounted to confiscation of property, and were unreasonable, oppressive, arbitrary and made upon a fundamentally wrong basis.

SAME (267-3)—IMPROVEMENTS—ASSESSMENTS—ARBITRARY ACTION. Under Rem. Code, §§ 7892-13, 7892-15, providing that assessments for trunk sewers under the zone system shall be distributed over all the property between the terminus of a trunk sewer to the middle of the block in an amount representing the reasonable cost of a local sewer, and the balance of the total cost shall be distributed over all the property within the entire district in accordance with special benefits and in proportion to area, an assessment was made arbitrarily and on a fundamentally wrong basis where two assess-

¹Reported in 203 Pac. 988.

Jan. 1922]

Opinion Per MITCHELL, J.

ments were made against the same property on account of the sewer being laid on two sides, unplatted average was omitted, and agricultural property in the outskirts was assessed at the same rate as business property.

SAME (267-3)—IMPROVEMENTS—ASSESSMENTS—BOUNDARIES OF DISTRICT—REVIEW. Though a local improvement diffuses benefits generally throughout a municipality, such fact will not sustain an arbitrary assessment which has proceeded upon a wrong basis and in direct opposition to the essential requirements of its statutes.

SAME (267-1)—QUESTIONS NOT REVIEWABLE. The action of a city council in excluding certain property from a proposed local improvement district will not be disturbed by the courts.

Appeal from a judgment of the superior court for Yakima county, Davis, J., entered February 21, 1921, upon findings in favor of the plaintiffs, in an action to annul an assessment roll, tried to the court. Affirmed.

J. C. Hauschild, A. W. Hawkins, D. H. Bonstead, and Richards, Fontaine & Gilbert, for appellants.

Grady, Shumate & Velikanje, for respondents.

MITCHELL, J.—On June 25, 1918, the town of Grandview, Washington, pursuant to a prior resolution, by ordinance established nine local improvement districts, 29 to 37 inclusive, for the purpose of constructing a sewer system consisting of a trunk sewer and sub-sewers or laterals. District 29 covered the trunk sewer, and the other eight districts the laterals. The district takes in a large area and includes the business section, the more thickly settled residence part of the town, and suburban and acreage property. Assessment or reassessment rolls were prepared and filed. Notice was given that a hearing upon them would be had before the town council on September 24, 1918. It appears, outside of the recorded proceedings of the town council, that certain property owners appeared to object orally to the assessments, and upon being advised protests should be in writing, were told they could do so at an

adjourned meeting to be held on October 15, 1918. On October 15, written protests were filed by property owners now in the case. This meeting was again adjourned to October 29, 1918, at which time the protestants were heard by counsel. The meeting was again adjourned to November 12, 1918, at which time, after discussion, the protests were overruled, as appears by § 3 of ordinance number 133, confirming and approving the assessment rolls, wherein it is recited that all objections filed or called to the attention of the town council were fully heard and carefully considered and found to be not well taken, and ordered overruled in all respects. An appeal was taken to the superior court, with the result that the assessments were annulled in so far as they affected the property of appellants, who are respondents in this court (Rem. Code, §7892-22). From that judgment of the superior court, the town of Grandview has appealed.

The first question is whether the protestants were properly allowed to maintain their appeal to the superior court. The contention is that the written objections were not timely filed. The statute (Rem. Code, §7892-21; P. C. § 1009) provides that the notice of hearing on the assessment roll shall notify all persons desiring to object "to make such objections in writing and file them with such clerk at or prior to the date fixed for such hearing", and it is argued that, as the written objections were not filed at or before September 24, 1918, nor earlier than the first adjourned meeting, October 15, 1918, therefore they are too late, and that the superior court had no right to entertain the appeal upon its merits. The argument rests upon a part of § 7892-21, Rem. Code (P. C. § 1009); Laws of 1911, ch. 98, §21, p. 452, which provides: "All objections shall state clearly the grounds of objections; and objections not made

Jan. 1922]

Opinion Per MITCHELL, J.

within the time and in the manner herein prescribed shall be conclusively presumed to have been waived'', and upon § 23, p. 455, of the same act, to the effect that, upon the confirmation of the assessment roll by the council, the validity and correctness of the proceedings relating to the improvement and assessment shall be conclusive in all things upon all parties, and cannot be questioned in any proceeding by any person not filing written objections to such roll in the manner and within the time provided in the act and not appealing from the action of the council in confirming the assessment roll.

Formerly a property owner, without appearing before the city council, could, within a reasonable time, contest the validity of special assessments for local improvements by an independent action in court. *Monk v. Ballard*, 42 Wash. 35, 84 Pac. 397. Since the act of 1911, however, assuming power in the city to make the improvement, and in the absence of fraud, such independent action cannot be maintained except for causes mentioned in § 23, which are non-existent here. *Shaser v. Olympia*, 92 Wash. 466, 159 Pac. 756. Evidently the purpose of the law was to change the remedy and provide for appearance in the proceedings before the legislative body of the city. It is the property owner's day in court, so to speak, and the penalty, upon his failure to so appear, is that he waives objections or the right to an independent suit in equity. But this does not argue that the city does not have the power, while the matter is yet pending and undetermined by an ordinance confirming and approving the assessment roll, to entertain protests filed in good faith. Had such been the intention of the legislature it would have said so. In *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560, speaking of these same provisions of the act of 1911, we said: "Manifestly, these

sections apply to independent and collateral proceedings and not to objections made in the proceeding itself." Had the council refused to consider these written objections because not filed until after the date first fixed by its notice, a different question would be presented, but that it did consider them prior to and at the date of its confirmatory ordinance which was delayed, not to permit the filing of written objections but for another purpose, was, we think, within its power.

Next, it is claimed the written protests filed were not sufficient to raise the questions presented on the appeal from the approval of the assessment roll. An examination of the objections shows that, while they contain many things foreign to the inquiry made in the superior court, they were entirely sufficient to call the attention of the council to the claims that the assessments were not levied according to special benefits (in some cases no benefit at all), that they amounted to confiscation of property, were unreasonable, oppressive, arbitrary, and made upon a fundamentally wrong basis. The evidence supporting the judgment from which this appeal has been taken falls within the scope of the written objections, which are sufficient as to formality under the cases of *Real Estate Investment Co. v. Spokane*, 59 Wash. 416, 109 Pac. 1057, and *In re Patterson*, 98 Wash. 334, 167 Pac. 924.

Upon the merits, the statute, Rem. Code, § 7892-15 (P. C. § 1003), relating to the construction of trunk sewers, reads:

"In any such case the district created to bear such assessment shall be outlined in conformity with topographical conditions, and in case of trunk sewers, shall include as near as may be all the territory which can be sewerred or drained through such trunk sewer and the subsewers connected thereto, . . . In distributing such assessments, there shall be levied against the

Jan. 1922]

Opinion Per MITCHELL, J.

property lying between the termini of the improvement and back to the middle of the blocks along the marginal lines of the street or areas improved, such amounts as would represent the reasonable cost of a local sewer and its appurtenances, . . . suited to the requirements of such territory in the mode prescribed in section 7892-13, and the remainder of the cost and expense of such improvement shall be distributed over and assessed against all of the property within the bounds of said entire district in accordance with the special benefits conferred thereon and in proportion to area."

Section 7892-13, Rem. Code (P. C. § 1001), just referred to, is the plan or system of assessments by subdivisions or zones paralleling the margin of a street or public place to be improved. Thus, by statute, in distributing the assessments for a trunk sewer, there shall be levied (1) against the property between the termini of the improvement and back to the middle of the blocks, such amounts as would represent the reasonable cost of a local sewer, in the mode prescribed in the section relating to the zone plan, and (2) the remainder of the total cost shall be distributed over all the property within the entire district in accordance with the special benefits conferred thereon and in proportion to area—not in proportion to area alone, but *in accordance with the special benefits and* in proportion to area.

The assessments for the trunk sewer that were approved by the city council were made by an engineer who lived in Spokane. He had never been in Grandview and knew nothing of the topography of the improvement district. He was wholly unacquainted with the different parcels of property as to whether they were improved or not, and he knew nothing of their locations with reference to the business and residence sections of the town. In arriving at part one of the

assessment for the trunk sewer (the zone plan) he took the general average of the cost per foot of the eight lateral sewers (whether the contract or estimated cost of them he could not tell), and assessed that amount against each foot of property abutting upon the trunk sewer, uniformly, between its termini, and regardless of the character of the different parcels of property or the special benefits conferred, if any. The testimony shows that a lateral sewer may be built in one part of the town at much less cost than in another; and there is no testimony to show what would be the reasonable cost of a local sewer at and along any point of the trunk sewer as laid. The statute, already noticed, requires that this part or subdivision of the assessment shall be determined by ascertaining the reasonable cost of a local sewer suited to the requirements of such territory, that is, the territory of the trunk sewer, not the reasonable cost of a local sewer suited to the requirements of some other locality. Again, as to this subdivision or portion of the assessment, it appears that in a number of instances where the trunk sewer is placed on two sides of a given piece of property, by its forming a right angle in its course, there has been an overlapping of the property by the burden of the assessment, apparently regardless of special benefits or the character of the property. And again, as to this part of the assessment, it appears that a considerable quantity of acreage belonging to the Northern Pacific Railway Company, included within the district and across which the trunk sewer passes, was erroneously or arbitrarily omitted. The statute, § 7892-13, Rem. Code (P. C. § 1001), provides that, where the assessment is by the zone plan, in case of unplatted property, the distance back shall be the same distance as included in the platted lands immediately adjacent thereto.

Jan. 1922]

Opinion Per MITCHELL, J.

Concerning the second or remaining portion of the assessment, it was spread upon all the property in the whole district in proportion to area alone, so that one thousand square feet of cultivated land in the outskirts of the city was assessed the same as that quantity of land occupied by a hotel or other business house in the business portion of the city, in spite of the statute which required it to be distributed over the property in accordance with special benefits conferred and in proportion to area.

The rule is that the action of the city council in determining the amount of the assessment is conclusive, unless it is shown that the council acted arbitrarily, or proceeded upon a fundamentally wrong basis. *Moore v. Spokane*, 88 Wash. 203, 152 Pac. 999. Notwithstanding the fact that this improvement has diffused benefits generally throughout the municipality, that of itself is not sufficient, of course, to sustain this arbitrary assessment which has proceeded upon a wrong basis and in direct opposition to the wise and essential requirements of the statutes. "Taxation by special assessment is defensible only upon the theory of corresponding special benefits to the property assessed. Const., art. 7, sec. 9." *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754; *In re West Marginal Way*, 112 Wash. 418, 192 Pac. 961.

Some contention is made by the respondents in support of the judgment that the city council erred in excluding certain property from the boundaries of the district. Oftener than otherwise, this is a difficult matter to determine. Exactness can seldom be attained. *In re Pine Street*, 57 Wash. 178, 106 Pac. 755; *Spokane v. Fonnell*, 74 Wash. 417, 135 Pac. 211; *In re Ninth Avenue*, 79 Wash. 674, 141 Pac. 61. Like the trial court, we are not disposed to disturb the action of the city

council with respect to the boundaries of the improvement district.

Judgment affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 16667. Department One. January 23, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. FRED
HUMPHREYS, *Appellant*.¹

CRIMINAL LAW (101)—EVIDENCE—RES GESTAE. In a prosecution for the larceny of a quantity of wheat, the testimony of the owner that the defendant voluntarily came to him and offered to pay for the wheat, to which he replied he was not selling wheat, he had been robbed three times and that he wanted this one run down, was admissible as part of the conversation in answer to defendant's offer.

APPEAL (445)—REVIEW—HARMLESS ERROR—MISCONDUCT OF COUNSEL. Improper cross-examination by the prosecuting attorney to which objection is promptly sustained by the court, is harmless error.

CRIMINAL LAW (345)—MOTIONS FOR NEW TRIAL—MISCONDUCT OF COUNSEL. The denial of a new trial on the ground of improper and prejudicial language of the prosecuting attorney was not an abuse of the court's discretion, where objection to the language was sustained, the counsel admonished, and the jury instructed to disregard it.

LARCENY (39)—TRIAL—INSTRUCTIONS—POSSESSION. An instruction that defendant's possession of stolen property, if the jury so find, is not of itself sufficient to justify a conviction of larceny, but defendant's possession thereof is a circumstance which may be taken in connection with all the other circumstances and facts in the case, is not erroneous in that it did not further state that the possession was personal, not simply constructive.

CRIMINAL LAW (250)—TRIAL—PROVINCE OF COURT AND JURY—WEIGHT OF EVIDENCE. A requested instruction that if the jury should be satisfied from the evidence that defendant's offer to pay for the stolen wheat, without admitting its larceny, was for the pur-

¹Reported in 203 Pac. 965.

Jan. 1922]

Opinion Per MITCHELL, J.

pose of avoiding publicity, that circumstance should not be regarded as evidence of guilt was properly refused, since the value of such testimony was for the jury.

CRIMINAL LAW (277)—TRIAL—INSTRUCTIONS—CHARACTER. The refusal of a requested instruction in a prosecution for larceny to the effect that evidence of good character may of itself be sufficient to raise a reasonable doubt as to the guilt of accused was proper, where such evidence has been admitted and the jury charged generally to consider it with other evidence in arriving at their verdict.

CRIMINAL LAW (358)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. The refusal of a new trial on the ground of newly discovered evidence of an alibi was within the sound discretion of the court, where it was cumulative with that given upon the subject at the trial.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered January 18, 1921, upon a trial and conviction of larceny. Affirmed.

J. N. Pickrell and Hanna, Miller & Hanna (F. L. Stotler, S. J. Chadwick, and Hugh C. Todd, of counsel), for appellant.

G. A. Weldon and W. L. Lafollette, Jr., for respondent.

MITCHELL, J.—The defendant was charged with the grand larceny of ten sacks of wheat belonging to R. B. Terrell. The jury found him guilty, and from a judgment on the verdict, an appeal has been taken.

The evidence shows the wheat was stolen. It was raised on a farm belonging to H. W. Hanford, rented on shares by Terrell. It was stolen on the night of August 25, 1920, from the field in which it had been lately threshed, near a public road. The theft was discovered on the morning of August 26. Terrell noticed the tracks of an automobile from the highway to the place from which the wheat was taken, thence back into the highway and onto the premises of the appellant. There were distinguishing features of the

automobile tracks. The owner and the deputy sheriff at once went upon the premises of the appellant and found ten sacks of wheat, corresponding to that stolen, in appellant's barn. They called his attention to the wheat, which was examined by them at that time. The three of them went to the field from which the wheat had been stolen, examined the tracks of the automobile at that place and again at the place of leaving the highway to go to the barn. The deputy sheriff and Terrell testified they examined the tires of the automobile and that they matched the tracks spoken of. They or other witnesses for the prosecution testified that he admitted he was in the car that made the tracks. They testified the appellant was told he had better take the wheat back, and that he said he would but that the neighbors would accuse him of being a wheat thief.

There is testimony to show that the wheat was removed from appellant's barn the night of the 26th of August or the next morning, by whom it is not shown. There is evidence to show that on the morning of August 27, upon appellant's going to the sheriff's office, and upon having read to him an arrest warrant which had been sworn out, he admitted the wheat found in his barn was not his, and that he said "I don't want any publicity. I would like to get this thing settled up." He first offered to pay for the wheat, and then offered to return it. It appears the latter was agreeable to Terrell at first, but appellant failed to return the wheat at the appointed hour, and thereafter Terrell refused to accept a return of it without the consent of his landlord. Accordingly, Terrell and the appellant went to see Hanford, at which time appellant stated he could not afford to let the matter get out, and wanted to pay for the wheat and for Terrell's time. Upon fixing upon the amount and while considering the situation, Hanford telephoned the sheriff's office

Jan. 1922]

Opinion Per MITCHELL, J.

and thereupon informed the appellant "it was too late; that he would have to make his case before the court." There were other incriminatory facts and circumstances in the case that need not be mentioned. It may be stated that the defendant, at the trial, denied many of the damaging admissions attributed to him, although he did admit there were conversations between him and witnesses for the prosecution at the times and places mentioned, that he did say rather than have the expense and publicity of a trial he would pay for the wheat, and that he told them he was in the automobile from the highway to the barn on his premises—the latter being a trip, as he testified, to care for a sick horse at the barn on the evening of August 25.

The first assignments of error relate to the court's permitting the witness Hanford to testify, over appellant's objections, and then refusing to strike the testimony after it was given, to the effect that he told appellant he (Hanford) had nothing to fix up, that he was not selling wheat, that he had been robbed three times out there, and that he wanted this one run down. The claim is that the testimony was irrelevant and prejudicial, and so remotely removed from the scene and time of the theft as not to be a part of the *res gestae*. Clearly, it was not offered as a part of the *res gestae*. The witness was called to prove that appellant had voluntarily gone to him and offered to pay for the wheat. His conduct and offer were in the nature of an admission, and the language objected to was but the answer to the offer appellant was making and was spoken at the very time and occasion of the offer being made, and was therefore admissible.

Assignment number 3, that the court erred in denying appellant's motion for a directed verdict at the close of the evidence for the state, is not supported by any argument and is, we think, without merit.

Assignment of error number 4 claims misconduct on the part of the prosecuting attorney (1) in language used in the cross-examination of the appellant, and (2) improper argument in debating the case to the jury. As to the first, the appellant contented himself, at the time of the question on cross-examination, to the objection that it was improper cross-examination, which objection was promptly sustained by the court. The question was not answered. As to the second, the language used expressed the speaker's opinion of the guilt of the accused. Promptly the court was appealed to with the objection that it was prejudicial, and a request that counsel be admonished. The objection was sustained, counsel was admonished, and the jury at once instructed to disregard it, and it may be mentioned that, prior to the happening of this occurrence, the court, in its general instructions to the jury, cautioned them against remarks made, or that might be made, by the attorneys on both sides not borne out by the testimony. As these things appear in the record, we cannot disturb the judgment and discretion of the trial court in denying the motion for a new trial, under the doctrine of *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490; *State v. Marion*, 68 Wash. 675, 124 Pac. 125; *People v. Zentgraf*, 193 Pac. (Cal. App.) 274; *State v. Curtis*, 108 Kan. 537, 196 Pac. 445.

It is contended the court erroneously gave the following instruction:

"I instruct you that where a person is accused of larceny, proof of recent possession of the property alleged to have been stolen is not of itself sufficient to justify a conviction of larceny. Therefore, if you find beyond a reasonable doubt that the wheat alleged to have been stolen by the defendant in this case was in his possession at or about the time it is alleged to have been stolen, and you further find that such wheat was

Jan. 1922]

Opinion Per MITCHELL, J.

stolen property, still the defendant's possession thereof, if you so find, is not alone sufficient to warrant you in finding him guilty, but is a circumstance which may be taken in connection with all the other facts and circumstances in the case in arriving at your verdict."

We think the instruction was correct under the testimony in this case. It is in harmony with the rule laid down in *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098. The principal criticism of it is that the state must go further than show the wheat was found in a barn upon appellant's premises, accessible to others, and show that the possession was personal, not simply constructive, and that it involved a distinct and conscious assertion of possession by the accused. There is much in the argument, "but the sense of the term 'possession' in this connection is not necessarily limited to custody about the person. It may be of things elsewhere deposited but under the control of a person." 17 R. C. L. (Larceny) § 77, p. 73. It is a question of fact, which was carefully recognized by the court in its instructions by saying, among other things, "therefore if you find beyond a reasonable doubt that the wheat alleged to have been stolen by the defendant in this case *was in his possession*, etc."

The court was not in error in refusing appellant's requested instruction to the effect that, if they were satisfied from the evidence the defendant offered to pay the prosecuting witness for the wheat, without admitting the larceny thereof, for the purpose of avoiding publicity, that circumstance should not be regarded as any evidence of guilt. The effect and value of the testimony was for the jury.

Next it is claimed the court committed error in refusing a requested instruction to the effect that evidence of good character may of itself be sufficient to

raise in the minds of the jury a reasonable doubt as to the guilt of the accused of the crime charged. Whatever may be the rule in other jurisdictions, this state has answered the argument to the contrary in the case of *State v. Cushing*, 17 Wash. 544, 50 Pac. 512, wherein it was said:

“The court was also requested to charge the jury that good character is admissible not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt. This instruction was refused and, as we think, rightly. It may be true as an abstract proposition of law, as stated in *People v. Jassino*, 100 Mich. 536 (59 N. W. 230), cited by counsel, that evidence of good character may be offered for the purpose of creating a doubt, but, in our judgment, where evidence of good character has been admitted by the court and the jury charged to consider it with the other evidence in arriving at their verdict, it is not necessary for the court to further state to the jury the purpose for which such evidence *may be admitted*. The statute requires the court simply to instruct *the jury* as to the law in the case, and, when the court has done that, it is not incumbent upon it to enlighten the jury upon abstract legal propositions.”

In the present case, the jury was instructed according to the rule in that case.

It is assigned as error that the motion for a new trial should have been granted because the evidence was not sufficient to support a conviction. Manifestly there was quite enough evidence, the jury believing it, to warrant the conclusion reached.

Lastly, it is urged a new trial should have been granted on account of newly discovered evidence of an alibi. The new evidence suggested was cumulative, and upon a consideration of it, as well as that given upon the subject at the trial, it must be concluded that the trial judge did not abuse a sound discretion in denying the motion for a new trial. *State v. Wilcox*,

Jan. 1922]

Opinion Per TOLMAN, J.

114 Wash. 14, 194 Pac. 575; *State v. Parker*, 114 Wash. 428, 195 Pac. 229.

Affirmed.

PARKER, C. J., TOLMAN, and BRIDGES, JJ., concur.

[No. 16694. Department One. January 23, 1922.]

ESTHER L. METZGER, *Appellant*, v. FRED W. METZGER,
Respondent.¹

DIVORCE (8-2, 37)—GROUNDS—FAILURE TO SUPPORT—EVIDENCE—SUFFICIENCY. The refusal of a divorce on the ground of failure to properly support a wife and child is proper, where the evidence shows there was no wilful disregard of such duty on the part of the husband, but only inability to make ample provision for their support, and, in some instances, the exercise of bad judgment in the expenditure of what limited resources he had.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 20, 1920, dismissing an action for divorce, tried to the court. Affirmed.

D. R. Glasgow, for appellant.

W. A. White, for respondent.

TOLMAN, J.—Appellant brought this action for divorce upon the ground of nonsupport. From a judgment denying her prayer for relief, she has appealed.

The parties were married in 1916, at which time the husband was earning \$20 per week, later increased to \$25. For the first year, and until their child was born, they subsisted on his earnings. Thereafter, because of frequent intervals of unemployment, moving about from place to place, the increased cost of living, and even less earnings by the husband during considerable

¹Reported in 203 Pac. 936.

periods, the wife and child have been inadequately provided for. Without doubt, the husband exercised bad judgment in some instances in buying what, in their situation, must be considered luxuries, instead of food and clothing, which were then needed, or would be needed in the immediate future. The trial court in its order recited:

“That while the defendant above named has not had the ability to make ample provision for the support and maintenance of the plaintiff, and the minor child of plaintiff and defendant, plaintiff has failed to show a purpose on defendant’s part to disregard his duty in supporting them to the best of his ability.”

It was evidently the opinion of the trial court that, under the statute making the neglect or refusal of the husband to make suitable provision for his family a ground for divorce, such neglect or refusal must be willful, and the burden to so show rests upon the wife when she seeks a divorce upon that ground. In this view we think the trial court was entirely right, and a careful reading of the evidence discloses nothing tending to prove willful neglect or refusal upon the part of the husband in this case. Should we concede that the wife has shown that the husband is more or less incompetent, and that he has at times exercised bad judgment, still the record as a whole conclusively establishes that he has had no willful purpose or intent to deprive his wife and child of that which they needed for their sustenance and comfort. In fact, it conclusively appears from the testimony as a whole that the respondent was at all times willing to provide, and did provide, so far as his limitations already referred to permitted.

The judgment of the trial court is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

Jan. 1922]

Opinion Per TOLMAN, J.

[No. 16682. Department One. January 23, 1922.]

A. JOSEPH BERRIAT, *Respondent*, v. WASHINGTON
WATER POWER COMPANY, *Appellant*.¹

STREET RAILWAYS (20)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—DRIVER OF VEHICLES. The driver of a vehicle who crosses a street railway track between street intersections, where street cars have the right of way under a city ordinance, is under the duty of exercising continuous observation for the purpose of avoiding injury, and though his wagon was struck by a street car proceeding at an excessive rate of speed, his own contributory negligence, after noticing the car some 300 feet away, in driving slowly upon the track without again looking before reaching that point, is sufficient to bar recovery for injuries to himself and vehicle arising from a collision.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered December 2, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Post, Russell & Higgins, for appellant.

Davis & Neil and *Frank Yuse*, for respondent.

TOLMAN, J.—Respondent, as plaintiff, sued on two causes of action; first, to recover for personal injuries; and second, to recover damages to the personal property of his employer injured in the same accident, the latter claim having been assigned to him by the owner of the property. The case was tried to a jury, which rendered a verdict in respondent's favor for \$1,178 on both causes of action. A judgment was entered on the verdict, and this appeal followed.

The defendant below, appellant here, assigns error upon the denial by the trial court of its motion for judgment at the close of plaintiff's case; its motion for judgment at the close of the entire case, and for

¹Reported in 203 Pac. 936.

judgment notwithstanding the verdict, interposed after the verdict was rendered. The sole question here, therefore, is, was there sufficient evidence to take the case to the jury.

Briefly stated, the record discloses the following facts: Respondent was driving a milk wagon, drawn by a team of horses, on Riverside avenue, in the city of Spokane, between 12 and 1 o'clock noon, on June 5, 1920. Proceeding eastward on the south side of the street, he made a stop midway between Bernard street on the west and Brown street on the east, to deliver milk at a restaurant. As he came out of the restaurant after making the delivery, he looked to the west along Riverside avenue and saw an eastbound street car stopped at the far side of Bernard street for the purpose of discharging or receiving passengers, a distance from him at the most some 300 feet. Without paying further attention to the car, he entered his wagon, started his team, held out his hand to the left, and turned as directly as he could across the street for the purpose of making deliveries on the other side. The distance from the curb to the south rail of the eastbound track is twenty-eight feet, and the team moved at a slow walk, going, as respondent repeatedly testified about two miles per hour. After the team was upon the street car tracks, and apparently about as the front end of the wagon reached the south rail, respondent again looked toward the west and saw the street car distant from him only some thirty-five feet, and approaching him at a speed which he estimated at between twenty and twenty-five miles per hour. He endeavored to hasten the movement of his team, but with little success, and the street car struck the wagon near the middle, or to the rear of the middle, inflicting the injuries complained of.

The maximum speed limit for street cars at the place of the accident was, by city ordinance, fixed at fifteen miles an hour. There was no intervening traffic to interfere with the view of the motorman operating the street car, or with respondent's view. There was sufficient evidence that the street car was exceeding the speed limit, and that the motorman was not keeping a lookout, to take the case to the jury on the question of appellant's negligence, if that were the only issue. Appellant, however, pleaded the defense of contributory negligence, based upon two grounds: First, the failure to give the proper signal before turning across the street, as required by the city ordinance; and second, the failure to recognize the right of way between cross-streets given to street cars over all other vehicles by city ordinance.

As to the first ground, there was evidence of a signal having been given, and a liberal construction of appellant's testimony regarding the giving of the signal would probably justify a jury in finding that it was given substantially as the ordinance requires. The second ground, however, presents a more serious question. It must be borne in mind that respondent was attempting to pass over the street car tracks midway between street intersections, at a point where the street car had the right of way under the ordinance, and where it was his duty to reasonably give way to a street car which he knew, or should have known, was approaching.

It was said in *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649:

"If the conceded right of way means anything at all, it puts the necessity of continuous observation and avoidance of injury upon the driver of the automobile (the person not having the right of way) when approaching a crossing, just as the necessity of the case

puts the same higher degree of care upon the pedestrians at other places than at crossings.”

This doctrine was approved in *Crowl v. West Coast Steel Co.*, 109 Wash. 426, 186 Pac. 866, and has been consistently followed in subsequent cases. So, applying the doctrine here, when respondent undertook to cross the street car tracks at a place other than a street intersection, he was under the duty and necessity of exercising continuous observation for the purpose of avoiding injury, a duty which his own testimony shows he did not perform. Hence it follows that he was guilty of contributory negligence and cannot recover.

Reversed, with instructions to grant appellant's motion for judgment *non obstante veredicto*.

PARKER, C. J., MITCHELL, BRIDGES, and FULLERTON, JJ., concur.

[No. C. D. 442. *En Banc*. January 25, 1922.]

*In re Application of LEON HUBBARD ELLIS for
Admission to the Bar.*¹

ATTORNEY AND CLIENT (1)—QUALIFICATIONS FOR ADMISSION—EXAMINATION—DISCRETION OF BOARD—STATUTES—CONSTRUCTION. The state board of law examiners, under Laws 1921, ch. 126, p. 407, is an arm of the supreme court created to aid the court in determining questions incident to the admission and disciplining of attorneys, and its rules in that respect are rules of the court.

SAME (1)—“MAY” AND “SHALL.” Laws 1921, p. 411, § 9, providing that applicants to practice law “may be admitted on accredited certificates” or upon examination, and that a diploma from the law school of the University of Washington is an accredited certificate, does not entitle the holder of such a diploma to admission, unless he also passes the bar examination under authority of Laws 1921, p. 417, § 19.

SAME (1). The right to practice law not being a right *de jure* given by statute, Laws 1921, p. 411, § 9, providing that applicants

¹Reported in 203 Pac. 957.

Jan. 1922]

Opinion Per PARKER, C. J.

"may" be admitted on diplomas of graduation from the law school of the University of Washington cannot be construed as mandatory.

BRIDGES and TOLMAN, JJ., dissent.

Application filed in the supreme court September 30, 1921, for admission to practice law without preliminary examination by the board of law examiners. Denied.

Preston, Thorgrimson & Turner, for applicant.

The Attorney General and *Nat U. Brown*, for respondent.

PARKER, C. J.—The applicant, Ellis, seeks admission to practice law in this state, claiming that he is entitled to admission, as a matter of right, without examination as to his learning in the law, because he is a graduate of the law school of our state university and has been granted a diploma evidencing that fact. His application having been in due course considered by the state board of law examiners, that board communicated its recommendation thereon to the court, as follows:

" . . . that the application be denied for the reason that it does not appear that the applicant has taken and passed the law examination. The board, having in its discretion, adopted the rule that all graduates of the University of Washington Law School must take and pass the law examination before they will be recommended for admission."

Thereupon the matter came on for hearing before the court *En Banc*, the applicant and the board having filed briefs and being heard in argument by their respective counsel.

While the question of the admission of an attorney to practice law in this state is one to be determined ultimately by this court, the proceedings looking to the

determination of an applicant's qualifications for admission are, in the first instance, had before the state board of law examiners, which board, under our statutes, is an arm of the court created to aid the court in determining questions incident to the admission and disciplining of attorneys. It is upon the record of proceedings had before, and the recommendation of, that board, and any challenge that may be made to such recommendation, that the question of whether or not the applicant shall be admitted is determined by the court. In ch. 126, Laws of 1921, p. 407, relating to the practice of law, we find all of our statutory law which we deem necessary to here notice, as follows:

“Sec. 3. The board shall pass upon all applications for permission to practice law before the courts of this state, and when satisfied that an applicant has the requisite qualification to practice as an attorney and counselor, it shall so certify to the supreme court; and upon such certification, unless objection be raised thereto and found sufficient, the court may make an order admitting the applicant, . . . (Laws of 1921, p. 409.)

“Sec. 9. Applicants may be admitted on accredited certificates or upon examination. An accredited certificate shall be:

“(1) A certificate from the clerk or other officer of the highest court of record of another state, or from the clerk of the court by which attorneys are admitted, under the seal of the court, showing that the applicant was entitled to practice and was actively engaged in practice in such state for five years or more next preceding the date of the certificate, together with a certificate from the chief justice or other member of such court, under the seal of the court, certifying that the applicant is in good standing at the bar of the court and is an honorable and worthy member of the profession. If the certificate last mentioned cannot be procured on account of lack of acquaintance, the board may accept in lieu thereof a certificate from the judge

Jan. 1922]

Opinion Per PARKER, C. J.

of the highest court of record in the county wherein the applicant last resided: *Provided, however*, That the certificate was issued within one year prior to his application for admission in this state.

“(2) A diploma of graduation from the law school of the University of Washington.

“(3) A diploma of graduation from an approved law school within the state of equal standing as to entrance requirements and hours of study to that of the law school of the University of Washington. (Laws of 1921, p. 411.)

“Sec. 10. The board shall examine the curricula of law schools and determine which ones shall be approved. No law schools shall be approved unless the board finds that its entrance requirements and hours of study are at least equal to those of the University of Washington school of law, or of the American Association of Law Schools. All applicants who have satisfactorily completed the course in an approved law school within this state, may, in the discretion of the board, be recommended for admission without further examination. . . (Laws of 1921, p. 412.)

“Sec. 19. The board shall prescribe forms, rules and regulations to carry out the provisions of this act. Such forms, rules and regulations shall have the same force and effect as if made a part of this act.” (Laws of 1921, p. 417.)

There are other provisions of the statute relating to the qualifications of an applicant as to citizenship, residence, morals, etc., with which we are not here concerned; since it is sufficiently shown that this applicant is duly qualified for admission to practice law in all other respects than as to his learning in the law. Among other rules adopted by the board in pursuance of what it considers to be its power under the provisions of § 19, above quoted, is one in substance that all applicants for admission who are graduates of our law school, as well as other applicants, must take and pass a law examination before they will be recommended

for admission. This rule, for present purposes, may be regarded as a rule of the court, and the real question is whether or not it is in violation of the provisions of § 9 of the law above quoted.

It is contended in behalf of the applicant that the word "may," found in the introductory paragraph of § 9, means "must" or "shall," in so far as it relates to subd. 2 of that section; that is, that the statute is in effect mandatory upon the board and the court, requiring the admission of one who holds an accredited certificate in the form of "A diploma of graduation from the law school of the University of Washington." It is argued that subds. 1 and 3, of § 9, read in connection with § 10, evidence such an express legislative intent to confer upon the board and the court discretionary powers as to the admission or rejection of applicants, other than those who are graduates of our university law school, as to negative the idea that there is any such discretionary power reserved to the board or the court touching the rejection of an application for admission rested upon an accredited certificate in the form of a diploma of graduation from our university law school. Having in mind the rule applicable to the conditions under which the word "may" is sometimes construed to mean "must" or "shall," there does seem to be some ground for arguing, in the light of all the provisions of this statute, that the word "may" has a mandatory meaning with reference to the admission of those who hold a diploma of graduation from our own university law school. But we think that, when the nature of the right to practice law is considered, such argument is not sufficiently persuasive to induce the holding that the word "may," as used in this statute, has other than its ordinary popular meaning. It is elementary law that:

Jan. 1922]

Opinion Per PARKER, C. J.

“As a general rule the words of a statute will be construed in their ordinary sense and with the meaning commonly attributed to them, unless such construction will defeat the manifest intent of the legislature, . . .” 25 R. C. L. 988.

And this is applicable to the word “may” unless there are very persuasive, or, we might better say, compelling reasons for holding “may” to mean “must” or “shall.” 26 Cyc. 1590. In *In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597, the court considered an application for admission under a statute similar to ours, and in holding that the word “may,” touching the court’s powers, did not mean “shall,” quoted with approval and rested its conclusion largely upon the general rule announced by Chancellor Kent in *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274, as follows:

“ . . . the word *may* means *must* or *shall* only in cases where the public interest and rights are concerned, and where the public or third persons have a claim, *de jure*, that the power should be exercised.”

Now, we think the law is well settled—indeed, we know of no holding to the contrary—that the right to practice law is not a right *de jure*. The nature of the right is well stated in the text of 2 R. C. L. 940 as follows:

“The practice of law is not a business open to all who wish to engage in it, nor is it a natural right, or one guaranteed by the Constitution, but a personal right or privilege limited to a few persons of good moral character, with special qualifications duly ascertained and certified. It is in the nature of a franchise from the state conferred only for merit, and is not a lawful business except for members of the bar who have complied with all the conditions required by stat-

ute and the rules of the court. Without any statutes on the subject of admission to practice, a person cannot practice as an attorney without a license from the court,”

This, it seems to us, is not only the nature of the right or franchise to practice law, which may be acquired by an individual, but is also the nature of the affirmative right which the public has, if any, in the admission of a person, of any particular qualifications, to practice law. In other words, we think that neither the individual nor the public has any right *de jure* to have a person of any particular qualifications admitted to practice law. Counsel for the applicant cite and place some reliance upon our decisions in *Vermont Loan & Trust Co. v. Greer*, 19 Wash. 611, 57 Pac. 1103, and *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 55 Wash. 1, 103 Pac. 426. Those cases, however, both involve the enforcement of purely private rights; the jurisdiction of a court being invoked in that behalf; which jurisdiction was conferred by statute by the use of the word “may,” having reference to the power of the court sought to be invoked; this court holding that the plaintiffs having shown themselves entitled to the enforcement of such rights, the court was bound to adjudge the relief sought; though its power and jurisdiction invoked was conferred by the word “may.” It seems to us, in view of the nature of the rights here involved and the reading of all the provisions of this statute, there is no compelling reason for holding “may” to mean “must” or “shall,” as contended for by counsel for the applicant; and that therefore the rule, that graduates of our university law school, as well as others, must pass a law examination before their admission to practice law, is not in violation of any rights given by § 9, above quoted.

Jan. 1922] Concurring Opinion Per HOLCOMB, J.

The recommendation of the state board of law examiners is approved and the application denied.

FULLERTON, MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

HOVEY, J., concurs in the result.

HOLCOMB, J. (concurring)—I concur in the result reached in the opinion of the majority.

Section 9 of ch. 126, Laws of 1921, p. 411, provides:

“Applicants may be admitted on accredited certificates or upon examination. An accredited certificate shall be:

“(2) A diploma of graduation from the law school of the University of Washington.

“(3) A diploma of graduation from an approved law school within the state of equal standing as to entrance requirements and hours of study to that of the law school of the University of Washington.”

Section 10 provides that the board shall examine the curricula of law schools and determine which ones shall be approved, and that all applicants who have satisfactorily completed the course in an approved law school within this state may, in the discretion of the board, be recommended for admission without further examination.

The very able and eminent senior counsel for the applicant, whose great energy, zeal and generosity are sincerely appreciated, both by printed brief and oral argument, engagingly argues that the approved schools above mentioned in § 10 are law schools other than the University of Washington; that the University of Washington law school is a preferred law school by which standards of others are fixed; that the legislature has an absolute right to prescribe the legal qualifications for admission to the bar; to prefer the state's institution of learning above all others; and to mandatorily direct that one holding its diploma of graduation

shall be admitted, and that the word "may" in § 9 means "shall."

The board of examiners make no distinction between the three classes of accredited certificates designated in § 9, and by rule require all holders of diplomas of graduation from the law school of the University of Washington and other approved law schools to satisfactorily pass an examination before the board.

Assuming, for argument, that the legislature may, as a matter of public policy, prescribe qualifications for admission to practice law, at least in coordination with the judicial department, I am not willing to so far surrender the judicial prerogative as to construe the word "may" in § 9 to mean "shall."

"The right to a license or to admission to practice law is not a right *de jure* given by statute, and we do not think the rule of construction invoked has any application to the case in hand." *In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597.

The rule complained of is a rule of court, being prescribed by an administrative arm of the court. It seems to meet the approval of the faculty of the law school of the State University, and for just reasons.

The learning required in the practice of law is continually becoming more complex, and vastly more comprehensive. The standards required for admission are therefore constantly made more rigorous.

After careful deliberation upon the matter, I conclude that the rule complained of is one within the discretion of the board, and of the court, and that we should not, for the time at least, change it, but should approve it.

The application should, therefore, be denied.

BRIDGES and TOLMAN, JJ., dissent.

Jan. 1922]

Opinion Per MAIN, J.

[No. 16633. Department Two. January 26, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. R. J. WEIR,
Appellant.¹

CRIMINAL LAW (111)—EVIDENCE—OTHER OFFENSES. In a prosecution for uttering a forged check upon a bank, evidence that defendant had previously drawn a number of checks upon a bank in which he once carried an account, but in which he had no funds at the time, is inadmissible for the purpose of showing criminal intent on the charge of forgery.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 3, 1921, upon a trial and conviction of forgery. Reversed.

Geo. Olson and *E. P. Donnelly*, for appellant.

Malcolm Douglas, *Eugene Meacham*, and *Chester A. Batchelor*, for respondent.

MAIN, J.—The defendant was charged by information with the crime of uttering a forged check. The trial resulted in a verdict of guilty as charged, and from the judgment entered upon the verdict, the defendant appeals. On September 27, 1920, the appellant presented to E. N. Brooks and Company, a corporation, a check for \$28.50 and received value therefor. The check was signed "L. L. Carter," was drawn upon the National Bank of Commerce of Seattle, and was made payable to the order of R. J. Weir, the appellant. L. L. Carter, the purported drawer of the check, had no account in the bank upon which it was drawn, and, so far as the record appears, was a fictitious person. The theory of the prosecution was that the appellant drew the check, signed the name L. L. Carter thereto, and presented it to Brooks and Company, where it was

¹Reported in 203 Pac. 953.

cashed. The evidence tends to show that the signature, L. L. Carter, was in the handwriting of the appellant. After the check in question had been introduced in evidence, the prosecution offered a bunch of checks, about 30 in number, which had been drawn by the appellant upon the bank in which he previously had an account and which were returned with the notation thereon of "insufficient funds" to cover the checks. The principal error assigned upon the appeal was the reception of these checks in evidence over the objection of the appellant. The appellant relies upon the general rule that, on the prosecution for a particular crime, evidence which in any manner shows, or tends to show, that the accused has committed another crime wholly independent of that for which he is on trial is irrelevant and inadmissible.

The respondent relies upon one of the exceptions to the rule, that evidence of other crimes similar to that charged is relevant and admissible where it shows or tends to show a particular intent which is necessary to constitute the crime charged. The crime of uttering a forged instrument, with which the appellant was charged and convicted, and the crime of drawing a check upon a bank in which the drawer has not sufficient funds to meet it are separate and distinct. The fact that the appellant may have drawn checks in considerable number upon a bank in which he previously had an account but in which, at the time the checks were drawn, there were no funds to meet them, does not tend to establish any element of the crime of uttering a forged check. It is unnecessary here to review the previous cases of this court where the general rule is applied, or the cases which the court held came within one of the exceptions to the rule. In *State v. Bokien*, 14 Wash. 403, 44 Pac. 889, the defendant was

Jan. 1922]

Opinion Per MAIN, J.

prosecuted and convicted for giving a check upon a bank in which he had no funds, and it was held error in that case to allow the prosecution to introduce testimony of other checks which had been given by the defendant to other persons when he had no funds on deposit. It was there said:

“Upon the trial the court permitted the state to introduce in evidence, over the objection of the defendant, several checks drawn by defendant, prior to the date of the one in question, and to prove that they had been presented to the bank by the various persons to whom they were given, and were not paid because the defendant had no funds on deposit, and that defendant knew that payment thereof had been refused. It seems that this evidence in reference to the drawing and delivery of other checks was admitted for the purpose of showing the condition of defendant's bank account, and, as a consequence, the intent with which he delivered the check to Sharick. There was no connection whatever between the several transactions which were permitted to be shown and that for which the defendant was being tried, and the evidence objected to was therefore incompetent for any purpose. We are, of course, aware that there are exceptions to the general rule that it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged, but we are of the opinion that the evidence here admitted does not come within any of the exceptions. *Commonwealth v. Jackson*, 132 Mass. 16; *Barton v. State*, 18 Ohio 221; 3 Rice, Evidence, pp. 208-211.

“The evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information, for the reason that it would not logically or legitimately follow that he intended to defraud Sharick because he had defrauded other parties at various times previously.”

The evidence offered and held by the court in that case to be incompetent was more closely connected

with the crime of which the defendant was there charged than is the bunch of N. S. F. checks offered in this case for the purpose of showing that the appellant uttered the forged check with intent to defraud.

There is another assignment of error to the effect that offered testimony should have been received, but the appellant does not seem to place much reliance upon this. It is sufficient to say that the trial court properly rejected the offered testimony of which the appellant in his briefs complains.

The judgment will be reversed, and the cause remanded for new trial.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16653. Department Two. January 26, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. LEW
TULLOCK, *Appellant*.¹

LARCENY (18)—EVIDENCE—OWNERSHIP OF PROPERTY—STATUTES AS TO RECORDED BRANDS. In a prosecution for the larceny of logs, the owner's mark thereon is admissible for the purpose of proving ownership, though it had never been recorded in compliance with the provisions of Rem. Code, § 7092, since that statute does not restrict evidence of ownership to recorded brands or marks.

SAME (25-2)—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY. In a prosecution for the larceny of logs, their value is sufficiently proven by evidence of the price obtained on a sale by the one who purloined them.

SAME (28)—TAKING OF PROPERTY—FELONIOUS INTENT—EVIDENCE—SUFFICIENCY. The felonious intent of the finder of logs adrift in taking possession and selling them is sufficiently shown by evidence that the logs had a private brand and that there were no other logs with the same marks, and that the finder had reasonable means of knowing ownership.

¹Reported in 203 Pac. 932.

Jan. 1922]

Opinion Per MAIN, J.

CRIMINAL LAW (458, 459)—PUNISHMENT—GROSS MISDEMEANORS—STATUTES. Under Rem. Code, § 2267, providing that one convicted of a gross misdemeanor may be punished both by imprisonment in the county jail and by a fine not exceeding \$1,000, and under Id., §§ 2200, 2209, authorizing the commitment to custody of a defendant adjudged to pay a fine, which, on failure to pay, he shall work out at the rate of two dollars per day, the court has power, upon sentencing a defendant to a term of imprisonment and to pay a fine, to further provide that he should be committed to jail until the fine is satisfied according to law.

Appeal from a judgment of the superior court for Clarke county, Simpson, J., entered March 29, 1921, upon a trial and conviction of larceny. Affirmed.

D. P. Price and *W. L. McFarling*, for appellant.

Jos. E. Hall, *Dale McMullin*, and *John Wilkinson*, for respondent.

MAIN, J.—The defendant was charged by information with the crime of grand larceny. The trial resulted in a verdict finding him guilty of petit larceny. From the judgment entered upon the verdict and the sentence imposed, the defendant prosecutes this appeal.

On and prior to December, 1920, the appellant, Lew Tullock, lived in Cowlitz county and was engaged in fishing in the waters of the Columbia river. The Aetna Logging Company, a corporation, was engaged in the logging business on the north fork of the Lewis river, in Clarke county. This company had adopted as a mark or brand for its logs what is referred to as Circle 1, which was a circle about two inches in diameter with the figure 1 across the center.

On the 14th of December, 1920, the company had a raft of logs stored in Lake river, and on the night of that day one of the rafts was broken up and the logs drifted down the river. The appellant, on the day following, took six of the cedar logs which had been in

the raft that was broken up while they were afloat in the Columbia river. Two days later, and on the 17th of December, the appellant sold these six logs to one H. J. Bratley, who at the time was operating a shingle mill. The purchase price was \$57.71, which was paid by check, and a receipt was signed by the appellant acknowledging payment on December 20. The appellant cashed the check, but before it reached the bank upon which it was drawn, payment had been stopped thereon. On December 29, the appellant was arrested, and shortly thereafter charged with the crime of grand larceny. The mark on the logs above referred to as Circle 1 had not been recorded in the auditor's office of the county wherein the company was doing business, as ch. 3 of title 55 of Remington's Code (§ 7092) provides that such marks may be.

It is the first contention of the appellant that, since the mark had not been recorded, it was not permissible to prove ownership by proving the mark. In the chapter referred to it is provided that logs placed in any river shall have some mark or marks upon them previously selected by the owner, and provides, as already indicated, for the recording of this mark in the auditor's office. There is further provision that any logs having any such recorded mark or marks impressed thereon shall be presumed to belong to the party in whose name such mark has been recorded. There is no provision in the statute to the effect that only recorded marks shall be recognized in law as evidence of ownership. In *State v. Swager*, 110 Wash. 431, 188 Pac. 504, the defendant had been charged with the stealing of certain cattle which were ear marked and branded, but of which there was no record. The contention was there made that, since the statute (Rem. Code, § 3156 *et seq.*; P. C. § 3703) provided for the recording of marks and

Jan. 1922]

Opinion Per MAIN, J.

brands upon cattle, it was error to permit evidence of such marks when the same had not been recorded. It was there held that, since the statute nowhere provided that only recorded marks and brands should be evidence of ownership, it was not error to introduce the evidence complained of; and it was further pointed out that the statute providing for the recording of such marks and brands made on the transcript of such record *prima facie* evidence of such ownership.

The statute providing for the adopting of a mark for logs and the recording thereof is strikingly similar to the statute which was under consideration in that case. In the logging statute there is no provision, as already stated, that marks adopted and recorded shall be the only recognized evidence in law of ownership. It is provided that, when such mark has been adopted, the property upon which they are impressed is presumed to belong to the party in whose name the mark is recorded. There is no reason why a different conclusion should be reached with reference to the logging statute from that which was arrived at in the case referred to.

The next contention is that there was not sufficient evidence of the value of the logs to take the case to the jury. This contention, however, overlooks the fact that the logs were sold for the price above stated, as well as other evidence in the record from which the value might have been inferred. It is true, at the time the logs were sold, there was on only one or two of them the mark, but there was evidence that, as to the other logs, the place where the marks had been had been chipped out.

It is further contended that the evidence failed to prove a felonious taking. The rule as stated in *State v. Hinton*, 56 Ore. 428, 109 Pac. 24, and other cases cited

by the appellant, to the effect that to make the finder of property guilty of larceny he must have had, at the time he took possession, an intent to convert the property to his own use, and that he knew at that time, or had reasonable means of knowing, who the owner of the property was, may be accepted. It follows then that if, at the time the appellant took possession of the logs, he knew, or had reasonable means of knowing, the owner, this was indicative of an intent to wrongfully take possession of the property. Under the evidence in this case, the logs had been marked and the marks were plainly visible, so that the jury were justified in believing that, at the time the appellant took possession of the same, he had reasonable means of knowing the ownership. There was evidence that no other logs of the same mark were being dumped into the Lewis river or were being boomed at the place where the logs in question were.

The last contention, as it appears in the appellant's brief, relates to the sentence imposed upon the appellant, which was that he serve a term of thirty days in the county jail and pay a fine in the sum of \$1,000, and that he be detained in the jail until the fine and costs had been paid or settled in accordance with the law. The point here is that the court having sentenced the appellant to a period of thirty days in jail as a punishment, it was error to provide that he should be kept in jail until the fine was settled according to law if it were not paid. The crime of which the appellant was convicted was a gross misdemeanor, and § 2267, Rem. Code, (P. C. § 8702), provides that every person convicted of a gross misdemeanor for which no punishment is prescribed by statute "shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than \$1,000, or by both."

Jan. 1922]

Opinion Per MAIN, J.

Here is an express provision that there may be both fine and imprisonment imposed when a person is found guilty of a gross misdemeanor. Section 2200, Rem. Code (P. C. § 9311), provides that, when a defendant is adjudged to pay fine and costs, the court shall order him committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law. Section 2209, Rem. Code (P. C. § 9320), provides that, when a defendant is committed to jail on failure to pay any fine or costs, he shall work out the same at the rate of \$2 per day. We find nothing in the statutes which would warrant a holding that it was the legislative intent that, when there was both imprisonment and fine, a defendant could not be committed to jail until the fine was paid. The court, in imposing a sentence of thirty days as punishment, did not exhaust its power so far as adjudging that the appellant should be committed to jail, and had the right to also provide that he should be there committed until the fine was paid, or otherwise settled as provided by law.

In *Berkenfield v. People*, 191 Ill. 272, 61 N. E. 96, construing statutes which are strikingly similar to those of this state, that court held that the court had power, after sentencing the defendant to a term of imprisonment and to pay a fine, to further provide that he should be committed to jail also until the fine was satisfied according to law. In *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372, and *Reese v. Olsen*, 44 Utah 318, 139 Pac. 941, the supreme courts of California and Utah, respectively, took the opposite view. In each of those states it was held that, where there was a sentence to jail as a punishment and the imposition of a fine, there could not be a commitment to jail until the fine was satisfied according to law, the term of serving the fine to begin at the conclusion of the penal sen-

tence. While the statutes of those states are in many respects similar to the statutes of this state, yet in each of them there is a provision which the courts thereof relied on to a considerable extent in reaching the conclusion which they did, and, so far as we are advised, there is not a similar statute in this state. Further than this, if the statutes were more similar to ours than they are we would be disinclined to follow the holding in those cases, because it seems to us that the correct view is that which was expressed by the Illinois court, and which we here approve.

There are some other minor questions, but we think what has been already said sufficiently covers them and it is not necessary to give them more detailed discussion.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, BRIDGES, and HOVEY, JJ., concur.

[No. 16625. Department Two. January 26, 1922.]

O. C. SMITH *et al.*, Respondents, v. MAXWELL H.
TELFORD, Appellant.¹

APPEAL (418)—REVIEW—FINDINGS. A finding by the trial court on conflicting evidence will not be disturbed on appeal, where it is supported by the weight of the evidence.

EVIDENCE (86) — ADMISSIONS — OFFER OF COMPROMISE. Evidence tending to support an actual compromise and settlement is not within the rule which does not permit evidence of an offer of compromise.

APPEAL (437)—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS. The denial of a motion to make a complaint more definite and certain cannot be urged as error on appeal, where the record shows that no prejudice resulted to appellant on account of the denial.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered April 5, 1921,

¹Reported in 203 Pac. 938.

Jan. 1922]

Opinion Per MAIN, J.

upon findings in favor of the plaintiffs, in an action for conversion, tried to the court. Affirmed.

Freece & Pettijohn, for appellant.

J. D. McCallum, for respondents.

MAIN, J.—This action was brought to recover the value of approximately thirty-seven cords of wood, alleged to have been wrongfully converted by defendant to his own use. The answer was a general denial. The case was tried to the court without a jury, and resulted in findings of fact, conclusions of law and a judgment sustaining the right of the plaintiffs to recover in the sum of \$217. From the judgment so entered, the defendant appeals.

Upon the merits, the questions presented are those of fact. The appellant was the owner of a farm in Lincoln county upon which there was certain timber land. In the fall of 1919, he contracted orally with O. C. Smith for the cutting of a portion of the timber into cord wood. After the contract was made, O. C. Smith, together with his brothers, C. L. and E. A., entered upon its performance and cut approximately eighty cords of wood. After the completion of the cutting, the respondents approached the defendant for the purpose of a settlement in accordance with the terms of what they claim to be a contract. At this time it developed that the views of the respective parties as to the contract were divergent. The respondents claimed that they were to cut forty cords for the appellant, for which they were to receive the reasonable value for cutting, which was not less than \$3.50 per cord, and that for the other forty cords they were to pay \$2 per cord stumpage. The appellant claimed that the contract was that the wood should be equally divided, the respondents taking forty cords

in payment of the forty cords which they had cut for him. After this dispute arose, the respondents claim that they reached a compromise and settlement by which they were to pay \$2 a cord stumpage for forty cords and were to receive twenty cords of the forty that was to go to the appellant in payment of the other twenty. The result of this would be that the respondents would be entitled to sixty cords and the appellant to twenty. The appellant denies that there was any compromise and settlement and insists that the contract was as originally claimed by him. A further question of fact is involved, and that is, whether the appellant prevented the respondents from entering upon the land and removing the thirty-seven cords of wood remaining thereon which was a part of the sixty. The appellant claims that he did not forbid the removal of any wood which belonged to the respondents.

It thus appears that there were three questions of fact upon which the evidence was directly conflicting: first, as to the terms of the contract; second, as to the settlement; and third, as to whether the respondents had been forbidden the entry upon the premises and the removal of the wood. Upon all these issues the trial court found specifically, supporting the contentions of the respondents. A careful reading of all the evidence leads to the conclusion that the findings of the trial court are supported by the weight thereof. It would serve no useful purpose to prolong this opinion by a detailed discussion of the evidence of the respective parties.

The appellant makes a further contention that evidence was wrongfully admitted, over his objection, which tended to support an attempt at compromise. The evidence offered was in support of what the respondents claim was a compromise and settlement, and

Jan. 1922]

Syllabus.

therefore did not come within the rule which does not permit evidence of an offer of compromise. Another contention is that the court erred in not sustaining a motion to make the complaint more definite and certain. Whether this motion should have been sustained is not now material. The record makes it plain that the appellant was in no manner prejudiced upon the trial by reason of the fact that the motion had not been granted. It would be an idle ceremony now to reverse the judgment and remand the cause for a recasting of the issues and a new trial when no prejudice has occurred.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16654. Department One. January 26, 1922.]

WM. G. REEDER, *Appellant*, v. HUDSON CONSOLIDATED MINES COMPANY, *Defendant*, C. W. SMITH, *Intervener and Respondent*.¹

FIXTURES (9) — BETWEEN VENDOR AND PURCHASER — INTENT IN MAKING ANNEXATION—EVIDENCE—SUFFICIENCY. Machinery and appliances annexed to a mine by the owner for the purpose of its development and operation pass to the purchaser as part of the realty upon a sale of the mine "together with all improvements;" and where such property is mortgaged back to the vendor to secure a purchase-money mortgage, an attaching creditor of the mortgagor can acquire no lien on such mining equipment and machinery as is shown by the intent of the parties to have been annexed to the mine as a part of the realty.

SAME (9). Where the owner of mining claims had annexed to the property for the purpose of development of the mine a quartz mill with its necessary machinery, an electric transformer, an electric motor, and "T" rails attached to the premises, on his sale of the mine with a mortgage back covering the claims "together

¹Reported in 203 Pac. 951.

with all improvements," an attaching creditor of the mortgagor could acquire no lien against such annexed property on the theory they were merely trade fixtures, since the intent of the vendor and his grantee is apparent that the equipment was treated as part of the realty.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered September 21, 1920, upon findings in favor of the plaintiff and intervenor, but dissolving a writ of attachment upon certain property, tried to the court. Affirmed.

W. C. Gresham, for appellant.

Adams & Vincent, for respondent.

MITCHELL, J.—Prior to March 15, 1917, C. W. Smith owned a group of four mining claims in Okanogan county, on which were situated certain buildings, including mill buildings and machinery attached and other mining equipment for the purpose of operating the mines. The property involved in this appeal was a part of the equipment or machinery and consisted of the following: One 10 stamp quartz mill and machinery belonging thereto; one electric transformer; one 50 horse power Fairbanks & Morse Company electric motor, and certain "T" rails attached to the premises.

He sold and delivered the mining property and improvements, and in consideration therefor, on March 15, 1917, took a purchase price mortgage in the sum of \$3,000 from the Hudson Consolidated Mines Company, a corporation, covering the mining claims and improvements. Upon default in payment of certain of the notes and mortgage, he commenced a foreclosure action on August 5, 1919. While that suit was pending, and on August 22, 1919, William G. Reeder commenced an action against the Hudson Consolidated Mines Company on an open account for services ren-

Jan. 1922]

Opinion Per MITCHELL, J.

dered and, by a writ of attachment, seized a quantity of the property of the mining company, including the machinery and equipment hereinbefore specifically mentioned. Thereupon C. W. Smith, plaintiff in the mortgage foreclosure suit, intervened in the Reeder suit. Upon the trial of the case, judgment was given Reeder in the amount sued for, which was declared to be a lien upon a large quantity of property seized by the writ of attachment, but the writ of attachment was dissolved as to the stamp quartz mill and machinery belonging thereto, the electric transformer, the 50 horse power electric motor, and all "T" rails attached to the premises. From that portion of the judgment dissolving the attachment upon the property just mentioned, William G. Reeder has appealed.

The Hudson Consolidated Mines Company defaulted in the case after personal service of the summons and complaint. The controversy now is between the appellant and C. W. Smith, and the only question to be determined is whether the property as to which the attachment was dissolved was real or personal property. As stated by the appellant, "of course, if it had been so attached as to become a part of the realty it was covered by respondent's mortgage; if not, respondent had no lien on it and appellant's attachment should not have been dissolved but preserved in the judgment." The court found that the property included in the mortgage is insufficient in value to satisfy the debt it was given to secure.

In determining whether a chattel annexed to the freehold is a trade fixture or a part of the realty the principal inquiry is into the intent of the party making the annexation. This may sometimes be difficult, but, whatever may be the legal relation of the parties waging the controversy, where the intent is discovered it

is generally controlling. *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 161 Pac. 478. In the case just cited it was said:

“A different rule obtains for determining the intent when the question arises between landlord and tenant, or licensor and licensee, than obtains when it arises between grantor and grantee, mortgagor and mortgagee, or heir and executor. When the annexation is made by a tenant or licensor the presumption is that he did not intend to enrich the freehold, but intended to reserve title to the chattel annexed in himself, while from an annexation by the owner of the property, the presumption is the other way. *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Dunsmuir v. Port Angeles Gas, W., El. L. & P. Co.*, 30 Wash. 586, 71 Pac. 9; *Lynn v. Waldron*, 38 Wash. 82, 80 Pac. 292; *Welsh v. McDonald*, 64 Wash. 108, 116 Pac. 589; *Cutler v. Keller*, 88 Wash. 334, 153 Pac. 15.”

In the present case, the evidence shows that the property in question was attached to the real estate as firmly as it appears to have been reasonably possible to attach it, and, highly important, it was so attached by the owner himself. The character of the property to which the annexation was made indicates the intention, since the things annexed were in use and to be used in the actual operation of the mines. The lands were patented mining claims. They were beyond the stage of prospecting and were ready for the work of production, which could not be accomplished without these annexations that were installed as a part and parcel of mining real estate. The presumption must be indulged in that they were attached by the owner with the intention to enrich the freehold. They were conveyed by a warranty deed by the owner, who had annexed them, the consideration for which deed was a real estate mortgage back that covered not simply the mining claims as such, but with the added words,

Jan. 1922]

Opinion Per MITCHELL, J.

“together with all improvements.” In the case of *Cutler v. Keller*, 88 Wash. 334, 153 Pac. 15, L. R. A. 1917C 1116, Tiedeman, Real Property (3d ed.), p. 23, § 17, was quoted with approval, as follows:

“ ‘When the absolute owner of land, for the better use of his land, erects property upon, or attaches it to the freehold, it will go to his heir, or pass by deed, to his grantee, and the same general rule applies between mortgagor and mortgagee, but as between landlord and tenant and licensor and licensee, this rule is relaxed, with a view to the encouragement of mechanical and agricultural pursuits.’ ”

The owner of the property, who made the annexation, and his grantee, who mortgaged the property back, by their dealings and conduct treated and considered the articles as annexed to the freehold and as constituting improvements to the real estate. This was done prior to the incurring of the indebtedness upon which this suit is based, and in this contest at the hands of the creditor of that grantee-mortgagor the creditor can have no claim, as against the rights of the mortgagee concerning the character of the property, greater than that of his debtor.

The recent case of *Siegloch v. Iroquois Mining Co.*, 106 Wash. 632, 181 Pac. 51, throws considerable light upon the case at bar. That was a case of the sale of mining property to be paid for on the installment plan, wherein provision was made for forfeiture upon default in making payments, and providing the owner was entitled to possession of the mining claims with all improvements placed thereon by the purchaser. The controversy was between the receiver of the purchaser and the owner as to whether machinery that had been placed on the property by the purchaser became a part of the freehold or continued to be chattels. It was said:

“By the term improvements, however, not everything placed upon the property will pass to the owner on a retaking of possession after default. The term must mean improvements of the realty; that is to say, such things as are placed thereon by the way of betterments which are of a permanent nature and which add to the value of the property as real property. This would include buildings and structures of every kind, and also such machinery as was placed thereon of a permanent nature and which tended to increase the value of the property for the purposes for which it was used; in this instance, those things of a permanent nature which tended to increase the value of the property as a mine.”

And here, as in that case:

“Turning to the evidence, we find nothing which the court awarded the owners which cannot be said to be an improvement of the property. It must be borne in mind that this is a mining property, having no value over and above the surrounding property unless the ores it contains can be extracted from it. To extract these ores profitably and successfully machinery of the sort here in question is an essential. It is all attached to the realty; is fixed in place and permanent in the sense that it can remain so attached and fixed until destroyed by the elements or worn out by use. Plainly, we think, these articles are improvements of a permanent nature, which enhance the value of the realty for the uses for which it is intended.”

Being satisfied the judgment of the trial court was correct, it is affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

Jan. 1922]

Statement of Case.

[No. 16492. Department One. January 26, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v. R. R. COLE,
Appellant.¹

WITNESSES (106)—IMPEACHMENT—CROSS-EXAMINATION—EVIDENCE OF FORMER CONVICTION. A defendant, prosecuted on a criminal charge, who testifies as a witness in his own behalf, may, for the purpose of impeaching his credibility, be properly cross-examined as to his having been convicted of the unlawful sale of narcotics.

INTOXICATING LIQUORS (51)—OFFENSES—JOINTIST—PRESUMPTIONS FROM POSSESSION—INSTRUCTIONS. In a prosecution for being a jointist, an instruction on the presumption of possession from the finding of liquor on the premises of accused was not prejudicial because of the fact that others had access to the place, where the instruction was qualified by the statement that the presumption was rebuttable, and the jury were charged to determine from all the evidence whether defendant had been proved guilty beyond a reasonable doubt.

SAME (31)—OFFENSES—JOINTIST. An actual sale of intoxicating liquor is not essential to the crime of being a jointist.

SAME (6)—PROHIBITION — UNLAWFUL POSSESSION — EIGHTEENTH AMENDMENT. The eighteenth amendment and the Volstead Act have not superseded the state laws making possession of intoxicating liquors unlawful.

CRIMINAL LAW (9-1) — MERGER OF OFFENSES — STATE AND CITY LAWS. Where an accused was, by stipulation, tried at the same time on a charge of being a jointist and on a violation of a municipal ordinance making unlawful possession of intoxicating liquor a crime, the payment of a fine in one case would not entitle defendant to a dismissal after verdict on the other charge, since they were separate offenses.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 13, 1921, upon a trial and conviction of being a jointist. Affirmed.

John M. Gleeson and *A. G. Gray*, for appellant.

William C. Meyer and *Louis F. Bunge*, for respondent.

¹Reported in 203 Pac. 942.

MITCHELL, J.—The defendant was convicted by a jury, in the superior court of Spokane county, of the crime of being a jointist. At the same time, before the same jury, by stipulation, he was tried and convicted upon complaint of the city of Spokane of the crime of unlawful possession of intoxicating liquor, in violation of one of its ordinances. There were two verdicts. A nominal fine imposed in the latter case was paid by him, and he has appealed from the judgment and sentence in the jointist case.

The first three assignments of error refer to overruled objections to questions asked in the cross-examination of the appellant as to his having been convicted of the unlawful sale of narcotics. He admitted the conviction upon a plea of guilty. The subject-matter of the cross-examination was for the purpose of affecting the weight of his testimony and, under the statute, was proper to be shown by a cross-examination of the defendant himself. Rem. Code, § 2290 (P. C. § 8725); *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *State v. Turner*, 115 Wash. 170, 196 Pac. 638.

Assignment 4 relates to an instruction with reference to the presumption of possession flowing from the finding of liquor on the premises of the accused at a place to which others had access. The instruction, as we understand from the record, was given for the purpose of the city's case for the unlawful possession of intoxicating liquor, and not in the jointist case. There was no error, however, in the instruction, for the statement complained of was qualified by the further statement that the presumption was rebuttable, and that the jury should determine from a consideration of all the evidence in the case whether the defendant had been proved guilty beyond a reasonable doubt.

Assignment 5 is that the court erroneously instructed the jury, in effect, that an actual sale of intoxi-

Jan. 1922]

Opinion Per MITCHELL, J.

cating liquor is not essential to a conviction of the crime of being a jointist. The instruction was correct. *State v. Greenwald*, 116 Wash. 463, 199 Pac. 730.

Assignments of error 6, 7 and 8 relate to instructions given that manifestly were intended to cover the case of the city against the defendant, of which he cannot complain in this appeal.

The contention that the 18th amendment to the Federal constitution and the Volstead law enacted pursuant thereto have superseded the state law upon which conviction was had in this case is opposed and answered by the cases of *State v. Woods*, 116 Wash. 140, 198 Pac. 737, and *State v. Turner*, 115 Wash. 170, 196 Pac. 638.

The claim that the superior court should have dismissed the case after verdict upon the showing that the appellant had paid the fine imposed upon his conviction in the case of the city against him is without merit. Of course, it was not plead as a defense or bar in the present case, and besides, upon stipulation, it was tried with this case as a separate offense, and it was, indeed, a separate and distinct offense. *State v. Woods*, 116 Wash. 140, 198 Pac. 737.

The motion for a new trial having no argument to support it, other than the matters already discussed, was properly denied.

Judgment affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16701. Department One. January 26, 1922.]

O. A. MENGER *et al.*, *Appellants*, v. INLAND EMPIRE
FARMERS' MUTUAL FIRE INSURANCE
COMPANY, *Respondent*.¹

INSURANCE (91) — FIRE INSURANCE — FORFEITURE OF POLICY — CHANGE OF TITLE OR INTEREST. A policy of fire insurance is avoided by a sale of the property without the consent of the insurance company, where consent of the company is imposed in the policy as a condition to the continuance of insurance upon a transfer of the property.

SAME (35, 91)—CONTRACTS (41)—VALIDITY—PUBLIC POLICY. A contract of fire insurance making it invalid upon a transfer of the property insured, unless the consent of the company be indorsed upon the policy, is not void as against public policy.

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered March 29, 1921, upon sustaining a demurrer to the complaint, dismissing an action on a fire insurance policy. Affirmed.

R. L. Edmiston, for appellants.

Charles P. Lund, for respondent.

MITCHELL, J.—From a judgment of dismissal, upon the plaintiffs electing to stand upon their complaint after a general demurrer to it had been sustained, the plaintiffs have appealed.

The suit is on a policy of insurance issued by the respondent to J. E. Balmer prior to August 15, 1918, and which was still outstanding at the date of the loss of the property by fire. The contract is fully set out in paragraph 3 of the complaint. Paragraph 4 of the complaint alleges that, on or about August 15, 1918, at Spokane, Washington, J. E. Balmer, "by clear deed, duly executed, delivered and recorded, sold, assigned

¹Reported in 203 Pac. 934.

Jan. 1922]

Opinion Per MITCHELL, J.

and conveyed to plaintiffs his interest in said property and duly assigned, for value, their interest, right and title in and to said policy of insurance and all rights and benefits thereunder to plaintiffs, etc.”

Paragraph 6 alleges that the plaintiffs’ agent was unable to reach the secretary of the company in order to obtain his signature to the assignment and cause it to be evidenced upon the company’s books as of August 15, 1918, prior to the fire which destroyed the property, owing to the fact that the secretary of the company resided in the country and that plaintiffs’ agent was expecting to see him in Spokane and get his signature or consent to the assignment.

Consent to the transfer or conveyance of the property was never endorsed on or appended to the policy. The policy provided: “Any change of title or ownership of this property renders this policy of insurance void, until consented to in writing by the secretary.” It is alleged in the complaint that this clause of the policy is void and against public policy.

The only question presented on the appeal is whether the policy was avoided by the sale of the property by Balmer without the consent of the insurance company endorsed on or added to the policy. The question must be answered against the appellants. While policies of insurance are construed strictly against the insurer, yet courts cannot make new contracts for parties nor grant relief against the plain and unambiguous terms of the contract. This court said in *Jump v. North British etc. Ins. Co.*, 44 Wash. 596, 87 Pac. 928, 12 Ann. Cas. 257:

“An insurance company has the right to determine for itself whom it will insure and what interest it will insure, and to provide that any change in such interest without its consent will work a forfeiture of the policy.”

That was a case in which the policy holder undertook to hold the company after he had transferred the property insured, without the consent of the company endorsed upon or added to the policy, having procured from the party owning the property at the time of the fire an assignment of any interest he might have in the policy. But the principle involved is just as applicable here, it being, that an insurance company has the right to determine whom it will insure and what interest it will insure or be liable for.

“An assignment of a policy of insurance with the consent of the company to a purchaser of the interest of the insured constitutes a new contract between the assignee and the company; the terms of the policy constituting the basis of the new contract.” Cooley, Insurance Briefs, vol. II, p. 1063.

No reason or authority is suggested, nor are we aware of any, supporting the contention that the clause of the policy in question is void or against public policy. No public policy is violated in refusing an original holder the right to recover after the property has been transferred without the consent of the insurer. Cooley, Insurance Briefs, vol. II, p. 1713. Nor is any public policy violated by denying recovery to one who is altogether remediless except by denying to another the right to select for himself the person with whom he shall make a contract.

Judgment affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

Jan. 1922]

Statement of Case.

[Nos. 16936, 16937. *En Banc*. January 26, 1922.]

THE STATE OF WASHINGTON, *on the Relation of
Kennewick Irrigation District, Plaintiff,*

v. THE SUPERIOR COURT FOR WALLA

WALLA COUNTY, *E. C. Mills,*

Judge, Respondent.

THE STATE OF WASHINGTON, *on the Relation of Pacific
Power & Light Company et al., Plaintiff, v.*

THE SUPERIOR COURT FOR WALLA WALLA

COUNTY, *E. C. Mills, Judge,*

*Respondent.*¹

EMINENT DOMAIN (21, 39)—PUBLIC USE—CONFLICTING CLAIMS—PRIORITIES—PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. The court may determine that the use of the waters of a river by an irrigation company for irrigating a large quantity of arid land, and for the development of power necessary to its irrigation scheme, is superior to the use of such waters by a city for merely power purposes in the distribution of water to its inhabitants apart from domestic and city purposes, there being no showing by the city of a necessity for the use of the river waters for domestic purposes, in view of the rule prescribed by Laws 1917, p. 448, § 4, that "in condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one;" especially where the irrigation use was prior in time.

SAME (111)—PROCEEDINGS — PARTIES — RIGHTS OF INTERVENERS. Where condemnation proceedings are instituted by an irrigation district against a power company for the purpose of establishing a superior use in the waters of a certain river, a city has no right to intervene therein for the purpose of securing an adjudication upon the city's right to condemn, as against the power company, property other than that involved in the proceeding by the irrigation company.

Certiorari to review a judgment of the superior court for Walla Walla county, Mills, J., entered November 16, 1921, adjudging a public use and necessity

¹Reported in 204 Pac. 1.

in condemnation proceedings, after a hearing before the court. Reversed.

Moulton & Jeffrey and *W. V. Tanner*, for relator Kennewick Irrigation District.

Sharpstein, Smith & Sharpstein, John A. Laing, and *Henry S. Gray*, for relator Pacific Power & Light Company *et al.*

Bruce E. McGregor and *Grady, Shumate & Velikanje*, for respondent.

PARKER, C. J.—These two certiorari proceedings were commenced in this court, looking to the review of an adjudication of public use and necessity rendered by the superior court for Walla Walla county in an eminent domain proceeding in which the relator irrigation district seeks to acquire certain water and property rights, in which proceeding the city of Prosser has intervened and seeks to acquire a portion of the same water and property rights, and other property, claiming in that behalf a condemnation right superior to that of the irrigation district. The eminent domain proceeding was duly transferred to the superior court for Walla Walla county for the purpose of a hearing and trial. The adjudication made by the superior court is in favor of the irrigation district as against all the defendants in the proceeding, but is in favor of the intervener city as against the irrigation district and all other parties to the proceeding, in so far as it awards to the city the condemnation right of acquiring one hundred second feet of the water.

The irrigation district was granted a writ of certiorari to bring the record of the eminent domain proceeding to this court, to the end that the adjudication of public use and necessity, in so far as it is against the irrigation district, be reviewed and corrected if

Jan. 1922]

Opinion Per PARKER, C. J.

found to have been erroneously so made. On the same day, the relator Pacific Power & Light Company was granted a writ of certiorari to bring the record of the eminent domain proceeding to this court, to the end that the adjudication of public use and necessity, in so far as it is against that company and in favor of the city, be reviewed and corrected if found to have been erroneously so made. In view of the fact that the adjudication was made by the superior court in one order and judgment as the result of one hearing of all the parties to the eminent domain proceeding, including the city as intervener, and separate returns to the writs would necessarily be the same, it was ordered that the superior court make but one return in response to both writs, which has been accordingly done. Upon the record so brought to this court, the respective claimed rights of all parties drawn in question by the writs have been here argued and submitted as one cause.

The Kennewick Irrigation District, contemplating the irrigation of several thousand acres of land in Benton county, commenced this eminent domain proceeding in the superior court for that county by filing its petition therein on February 23, 1921, thereafter filing an amended petition, seeking to acquire the dam constructed across the Yakima river at the city of Prosser; all of the waters of the Yakima river, not already owned by it, flowing to and impounded by the dam; the right to divert all of such waters from the river at a point just above the dam; certain rights of way along which to convey the diverted water to a power plant to be constructed as a part of the irrigation system and to the land to be irrigated; and the right to take and damage certain other property. While there are numerous defendants whose property

is so sought to be so taken or damaged, we may, for present purposes, ignore all defendants save the Pacific Power & Light Company, the principal owner of the waters sought to be so acquired by the irrigation district; since none of the other defendants now challenge the right of either the district or the city to acquire the water and property rights sought by them.

The right of the irrigation district to acquire the water and property rights it seeks is not challenged by the Pacific Power & Light Company; but that company does challenge the right of the city to acquire by its intervention in the eminent domain proceeding the water rights and property it seeks, upon the ground of want of proper preliminary jurisdictional steps to be taken by the city authorizing it to exercise its eminent domain right in that behalf. The irrigation district challenges the right of the city to exercise its eminent domain right upon the same ground, and also upon the ground that the contemplated public use of the water and property by it sought to be acquired is superior to that contemplated by the city. We shall proceed for the present upon the assumption that the city has taken the preliminary jurisdictional steps enabling it to exercise its right of eminent domain, in so far as it seeks to acquire water and property rights which are also sought to be acquired by the irrigation district, and that it was proper for the trial court to permit the city to file its intervention petition in the eminent domain proceeding in that behalf. In view of our conclusion, under the facts and circumstances here shown, that the irrigation district's right of condemnation as to all the water and property rights it seeks to acquire is superior to that of the city because of the greater necessities of the irrigation district and the greater public benefit which will result therefrom, we

Jan. 1922]

Opinion Per PARKER, C. J.

shall here note principally the facts touching the respective contemplated uses of the water sought to be made by the irrigation district and the city, and as we proceed we think it will become apparent that our decision upon this question of superior public benefit and use will be decisive of the merits of this whole controversy, in so far as we are here called upon to decide it.

The irrigation district was duly organized as a public corporation under the laws of this state, looking to the reclaiming by irrigation of several thousands of acres of arid land lying in the lower Yakima valley, by taking and diverting 1,100 second feet of the water of the Yakima river, being practically all of the water of the river during the months of July and August of each year, when the water is at its lowest stage, from a point just above the dam at the city of Prosser. The record is not at all satisfactory in showing the number of acres proposed to be, and which will be, so reclaimed by the construction of the proposed irrigation project; but it seems certain that, in any event, the number of acres runs into the many thousands, and will, according to the proposed use of the water by the irrigation district, render necessary the taking of all of the water from the river as contemplated during its lowest stage in the months of July and August of each year, leaving none for the use of the city during those months. The entire flow of the river to the dam during those months is approximately only 1,100 second feet. Of this the irrigation district already owns 480 second feet, with the right to divert it from the river at a point above the dam. The irrigation district proposes to carry all this water from the diversion point above the dam through a canal a distance of some ten miles down the river to a point at a considerable height above the

river, and under or below that point construct a water power pumping plant to be operated by power generated by the dropping of approximately 600 second feet of the water into such pumping plant; and by such power raising the balance of the water to higher levels, so that it may then by gravity serve the land to be irrigated. Six hundred second feet of the water will thus be there returned to the river to flow on in its natural course to satisfy the requirements of other irrigation districts below, already established and in operation. This proposed irrigation system has been worked out in detail and recommended to the district by the United States Government Reclamation Service as a practical and efficient irrigation system effectual to reclaim and irrigate the several thousands of acres of land in question, and as being the most economical and efficient use of the waters of the Yakima river at and below Prosser for irrigation. There is no other practical or efficient way to serve the lands so proposed to be reclaimed and irrigated, and it will require all of the 1,100 second feet of water to accomplish that end.

It is argued in behalf of the city that, by the irrigation district's abandoning or being deprived of the right to use one hundred second feet of the water for power to raise water to serve some 3,600 acres of the land, the remainder of the proposed irrigation project could proceed unhampered. We think, however, the evidence calls for the conclusion, as contended by counsel for the irrigation district, that to so limit the irrigation district's right of condemnation would so materially impair the efficiency of its project as to call for an abandonment of the whole of it. This, we think, results from the unified and more or less dependent nature of the several parts of the project, one upon the other.

The city of Prosser seeks by its intervention in the condemnation proceeding, and was awarded by the adjudication therein, the right to acquire one hundred second feet of the waters of the river flowing to the dam, which hundred second feet we may for present purposes regard as being owned by the Pacific Power & Light Company, to the end that it [the city] may, by dropping that quantity of water just below the dam, generate power in a pumping plant, to be there constructed by it, for the purpose of pumping water from the city's source of water supply, consisting of wells within the city, for domestic and city use. There are some allegations in the city's intervention petition which may seem to suggest that the city is seeking to acquire this one hundred second feet of water from the river directly for domestic and city purposes as well as for power, as above noticed; but it is plain from the record that such is not the purpose of the city in seeking to exercise its eminent domain right in this condemnation proceeding. Its purpose is only to acquire power for the pumping of water from a source of supply, already in existence, entirely apart from the waters of the river, which source of supply, so far as quantity and quality are concerned, is already ample to satisfy both the present and probable future needs of the city, aside from the question of power. The city is now, and has been for some considerable time, purchasing ample electric power for pumping purposes; and we think the record fails to show but what the city will be able in the future, to the full extent of its necessities, to obtain such electric power, or other power, for such purpose. Nor does the record show but what such power may be acquired by the city in the future as economically and efficiently as it could furnish its own pumping power from the

water and power plant it seeks to acquire through its intervention in this condemnation proceeding.

We have, then, for comparison of these two conflicting eminent domain claims of the irrigation district and the city, for the purpose of determining which would redound to the greater benefit of the public, these considerations: (1) Both the irrigation district and the city, we may for present purposes assume, are seeking the hundred second feet of water for power purposes only; the former to aid and make efficient its pumping plant to raise water for irrigation purposes; and the latter to generate power in its proposed pumping plant to raise and make available water from its wells, wholly apart from the river, for domestic and city purposes; (2) the greater necessity, as we think, on the part of the irrigation district to make its irrigation project and the operation thereof efficient and effectual; (3) the reclamation and the bringing to a high state of productiveness, by the irrigation project, of many thousands of acres of otherwise practically worthless arid land; (4) and the fact that the irrigation district first sought condemnation of the water and property rights in question.

It may be that, speaking generally, the use of water for usual city and domestic purposes is a public use of a character superior to the use of water for irrigation; and that, were we to put aside the fact of the acquisition of the use of this water for power only, and the comparative necessities of the irrigation district and the city, we might feel required to hold that the disposition of the question of public use and necessity was properly disposed of by the trial court in favor of the city. But our problem is not so narrowly conditioned. Having in view what seems to us the greater necessity of the irrigation district, the greater public

benefit to result from the completion and putting in operation of its project, and the fact that the city will manifestly go on practically undisturbed in the furnishing of itself and its citizens with water, even though it be compelled to look elsewhere for pumping power than to its present source in that behalf, we cannot escape the conclusion that the public use to which the irrigation district proposes to devote all of the water and property it seeks is superior to that of the city, in that the public will reap a greater benefit from the proposed use by the irrigation district than it would from the proposed use by the city.

There seems but little room for controversy touching the law that should govern our disposition of this question. In § 4 of our water code (Laws of 1917, p. 448), we read:

“In condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one: . . .”

This, seemingly, is the first time in this state that conflicting claims to the exercise of the right of eminent domain have arisen in a condemnation case, wherein two parties to the proceeding are for the first time asserting their conflicting eminent domain claims. We apprehend, however, that the rule would not be in principle materially different from that which obtains when one public service corporation is seeking to acquire by condemnation the property of another public service corporation already devoted to a public use. Since the irrigation district was plainly prior in point of time in the beginning of its condemnation proceeding, and because of the fact alone has at least the presumptive superior right in its favor (*Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. Cascade Public Service Corp. v.*

Superior Court, 53 Wash. 321, 101 Pac. 1094; *Chehalis v. Centralia*, 77 Wash. 673, 138 Pac. 293), it would seem that the city is in but little better position, if any, than it would be if it were seeking to condemn this hundred second feet of water had the irrigation district already acquired such water; though it is probable, in such a case, that the city would have a somewhat greater burden of proof of superior use. The rule measuring the degree of necessity of a condemnor, as against another public service corporation, seems to be stated in keeping with the views of this court in its quotation from Lewis, *Eminent Domain* (2d ed.), § 276, in *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637, as follows:

“ ‘But we should say that there was a reasonable necessity for the taking where the public interests would be better subserved thereby, or where the advantages to the condemnor will largely exceed the disadvantages to the condemnee.’ ”

The following decisions of this court are in harmony with this view: *State ex rel. Washington Boom Co. v. Chehalis Boom Co.*, 82 Wash. 509, 144 Pac. 719; *State ex rel. Union Trust & Savings Bank v. Superior Court*, 84 Wash. 20, 145 Pac. 999, 149 Pac. 324; *State ex rel. South Fork Log Driving Co. v. Superior Court*, 102 Wash. 460, 173 Pac. 192.

Applying the rule of our water code, above quoted, and the law as announced in these decisions, we reach the conclusion that the judgment of the trial court should be reversed, in so far as it denies to the irrigation district the right of acquisition, through this condemnation proceeding, of the water rights and property it seeks and awards to the city the condemnation rights it seeks.

There seems to be an attempt by the city, by its intervention, to acquire, as against the Pacific Power &

Jan. 1922]

Opinion Per PARKER, C. J.

Light Company, certain property other than that which is sought to be acquired by the irrigation district. Whether or not the city desires to continue its efforts in that behalf in this condemnation proceeding is not made plain by this record. We are of the opinion, however, that such an effort on the part of the city, by intervention in this condemnation proceeding, is not a proper procedure; and that the city's intervention should be dismissed, in so far as it seeks acquisition of such other property, but without prejudice to the city's right to commence and prosecute such condemnation proceedings as it sees fit, looking to the acquisition of property rights other than those sought in this condemnation proceeding to be acquired by the irrigation district.

The cause is remanded to the superior court with directions to render an adjudication of public use and necessity as prayed for by the irrigation district, and to dismiss the city's intervention petition.

All concur.

[No. 16783. Department One. January 26, 1922.]

MENTZER BROTHERS LUMBER COMPANY, *Respondent*, v.
C. E. RUSSELL, *Doing Business as Russell*
Mill Company, Appellant.¹

APPEAL (418)—REVIEW—FINDINGS. A finding by the trial court based on conflicting evidence with respect to the scale of logs sold by plaintiff to defendant will not be disturbed on appeal.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered May 2, 1921, in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

P. C. Kibbe, for appellant.

T. F. Mentzer and *Troy & Sturdevant*, for respondent.

TOLMAN, J.—Respondent, as plaintiff, sued to recover the value of cedar logs shipped to appellant during the month of September, 1920, at the agreed price of \$20 per thousand, f. o. b. Tenino, alleging that it so delivered 157,194 feet of logs, of the value of \$3,143.88. Appellant denied that more than 123,991 feet of logs were delivered, and tendered payment for that amount. The only controversy in the case is over the scale of the logs. From a judgment against him for the full amount demanded, appellant appeals.

Respondent procured the logging and loading to be done by contractors, who were paid for their work at an agreed price per thousand, and for the purpose of determining the amount earned by the contractors, they agreed with respondent upon a disinterested scaler, whose scale should be binding upon both. Re-

¹Reported in 203 Pac. 737.

Jan. 1922]

Opinion Per TOLMAN, J.

spondent, in billing the logs to appellant, used this same scale and bases this action thereon.

The only direct evidence as to the amount of logs delivered to appellant is based upon the testimony of this scaler, upon the one hand, and the evidence of appellant, who testified to a scale made by himself as the cars arrived at his mill, upon the other. There was considerable indirect testimony upon both sides. Appellant, by a large number of employees, showed the logs to have been of poor quality, though it is admitted upon both sides that the quality of the logs is largely immaterial if they were properly scaled, allowing for defects and imperfections. Appellant also produced some testimony to the effect that good cedar should cut 10,000 shingles to each 1,000 feet of logs, and that fair or medium cedar should cut 8,000 to 9,000 shingles. He offered the tally cards of his mill showing that the logs in question cut but 6,600 clear shingles per 1,000 feet according to respondent's scale, and 8,600 according to his own scale, but no account is made of clear shingles less than twelve inches in width, and culls, some of each of which, it is admitted, were cut.

Could we say that the witnesses, testifying directly to the scale of the logs, exactly offset each other, then we might hold that the evidence preponderates against the finding of the trial court, but this we cannot do. The trial court had the advantage of seeing both of these witnesses and hearing them testify, and from the impression thus gained concerning the disinterestedness of one and the interest of the other, and still bearing in mind all the surrounding circumstances shown by the indirect evidence, the court was evidently convinced that respondent's scaler had made a fair and impartial scale of the logs in question, allowing with reasonable judgment for the defects and poor quality

thereof, and we, lacking the trial court's opportunity of seeing and hearing the witnesses, cannot say that the conclusion reached was wrong.

Appellant made no formal assignments of error, but as we gather his points from the brief and argument, we are convinced that the trial court committed no reversible error, and the judgment appealed from is therefore affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16562. Department One. January 27, 1922.]

WILLIAM RAY, *Respondent*, v. WALKER D. HINES,
as Director General of Railroads, Appellant.¹

RAILROADS (64)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE. Where it is customary at a railroad crossing over a city street to signal the movement of trains about to cross, an automobile driver who continues his course along the street in reliance upon the customary signal being given, and in the absence of any apparent danger, would not be chargeable with contributory negligence as a matter of law in case of a collision between his automobile and the train.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered July 7, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

A. C. Spencer and Hamblen & Gilbert, for appellant.
Charles P. Lund, for respondent.

TOLMAN, J.—This action was instituted by respondent, as plaintiff, to recover for personal injuries and damage to his automobile, resulting from a collision between the automobile driven by respondent and a

¹Reported in 203 Pac. 929.

Jan. 1922]

Opinion Per TOLMAN, J.

train operated on the Oregon-Washington Railway & Navigation Company's tracks in the city of Spokane by the director general of railroads. From a verdict in respondent's favor for \$1,500, and a judgment entered thereon, appellant brings the case here for review on appeal.

The assignments of error raise the single question of the sufficiency of the evidence to sustain the verdict, necessitating a brief statement of the facts as the jury may have found them to exist.

Shortly after 10 o'clock p. m., on July 28, 1918, respondent was driving a five-passenger Pan touring car north on Division street, a paved north and south street in the city of Spokane. The street is sixty feet wide from curb to curb, the center being occupied by a double line of street car tracks. At the point of the accident, the Oregon-Washington Railway & Navigation Company maintains a switch track which crosses Division street from the southwest to the northeast, and across this track, but outside of the street lines, gates are so located that before a train may cross the street it must come to a full stop and the gates be opened before it can proceed. No flagman or watchman is stationed at this crossing, but it is customary for a switchman to get off the train as it comes to a stop, proceed ahead to unfasten and open the gates and give a warning signal to travelers on the street while passing across from gate to gate.

As respondent approached this crossing, he was driving at a speed of about fifteen miles per hour; the night was cloudy and dark; his headlights were burning, throwing a direct light some seventy-five feet in advance of his car, but not revealing objects on either side to any considerable extent. There was an arc light maintained by the city over the center of the

street some fifty feet to the south of the crossing, but respondent's witnesses, while not positively denying that this light was burning at the time, all say that they did not notice or observe it, and rather stress the idea that it was unusually dark for that time and place. As respondent approached the crossing under these circumstances, a switch engine backing from the east and pushing some fourteen box cars was proceeding slowly westerly. As the train approached the easterly gate it stopped, the gate was opened, and according to one of respondent's witnesses, the switchman proceeded across the street toward the westerly gate, swinging his lantern, and disappeared from view. Respondent testified that he saw no signal of any kind, heard no sound, and was wholly unaware of the presence of the train until the instant of the collision, and all of his other witnesses testifying in harmony with him. Respondent proceeded without any slackening of speed along the middle of the east side of the street, keeping a lookout straight ahead upon the roadway as revealed by his headlights, and as he reached the crossing, the dead end of the first box car of the switch train loomed up suddenly and silently out of the surrounding darkness and instantly, before he had time to swerve his car, increase his speed, or do any other act for his own protection, struck his automobile, inflicting the injuries for which he sues, and fatally injuring a companion who was riding with him.

The jury may have disbelieved the evidence of the one witness as to the switchman having crossed the street swinging the lantern before the train entered the street, or, it may have determined that the signal, if given, was given so long before the accident that respondent had not yet reached a point where he could or would be likely to have seen it. There is nothing in

Jan. 1922]

Opinion Per **TOLMAN, J.**

the testimony which establishes the fact that the signal, if given, was given at a time when respondent was in such proximity to the crossing that reasonable prudence required that he be then looking with a view of determining whether he should stop or proceed. It is admitted by the pleadings that it was the duty and custom of appellant to give a warning by flag or lantern signal of the approach of trains at this crossing, and respondent is shown to have been entirely familiar with the conditions, and the jury may have found rightfully that he relied to a considerable extent upon this custom. True, as to the giving of the lantern signal, the evidence was conflicting, and appellant's witnesses testified to the giving of ample and timely warning by the switchman; but the evidence being in conflict, the question was for the jury, and their verdict establishes that no timely signal was given. What then is the law?

“Where a flagman is employed or a gate established, whether such duty is imposed by statute or not, the person in charge is bound to perform his duties with reasonable care and prudence, and a failure to do so is negligence for which the railroad company is liable. Where a flagman or watchman is employed at a public highway crossing, until the public has become accustomed to regard his presence or absence as one of the evidences of the approach of trains, or otherwise, it is part of the company's duty to keep a fit person there whose conduct will not be liable to mislead and deceive the traveling public; and it is the duty of the flagman or watchman to use reasonable care to know and give timely warning of the near approach of trains, not only so as to avoid a collision, but also to enable a traveler approaching a crossing, in the exercise of reasonable care, to protect himself against other accidents, and the public have a right to rely upon a reasonable performance of that duty. The public have a right, when the gates are open, or the flagman not in his accustomed place of duty, to presume, in the ab-

sence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties, and it is negligence for a gatekeeper or flagman to leave his post, knowing that an engine is approaching, without giving some signal of danger. If the flagman or watchman neglects to give any warning, or does not give a warning until the traveler is in great danger, especially where the view of the approaching train is obstructed, and no signals are given by it, the railroad company is responsible. Where gates are established, although there is no statute requiring their maintenance, it is negligence if they are not constructed, attended, and maintained, with ordinary care and prudence, so as to give the proper warning of an approaching train, or so as not to injure a passer-by by the manner in which they are maintained or closed. Likewise it is negligence to leave them open when trains or cars are passing, except as to one who sees the train going in front of him, and the mere fact that the flagman signaled the person injured not to cross does not free the railroad company from negligence, unless such signal is given in time for such person by the exercise of reasonable care to avoid the injury." 33 Cyc. 946.

Whether the flagman be stationed at the crossing, or the custom be established of giving a warning by the men in charge of the movement of trains across the street, the result is the same. In either case the public is led to expect the warning if there be imminent danger, and the failure to give the customary warning tends to mislead and deceive. In fact, such failure becomes in effect a trap.

There are not wanting cases which hold that the traveler cannot entirely rely upon signals and the performance of duty by a flagman, but must also seek to safeguard himself by the use of his faculties and other means at hand. *Cadwallader v. Louisville N. A. & C. R. Co.*, 128 Ind. 518, 27 N. E. 161; *Waterson v. Chicago, M. & St. P. R. Co.*, 164 Wis. 375, 160 N. W. 261; *Fogg v. New York, N. H. & H. R. Co.*, 223 Mass. 444, 111 N.

Jan. 1922]

Opinion Per TOLMAN, J.

E. 960; *Delaware, L. & W. R. Co. v. Welshman*, 229 Fed. 82; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577; *Lindsay v. Pennsylvania R. Co.*, 78 N. J. L. 704, 75 Atl. 912; *Kentucky & I. Bridge & R. Co. v. Singheiser*, (Ky.) 115 S. W. 192. See, also, *Swigart v. Lusk*, 196 Mo. App. 471, 192 S. W. 138; and *Philadelphia & R. R. Co. v. Le Barr*, 265 Fed. 129.

While we agree that the failure of the flagman to give the customary warning does not warrant the traveler in rushing into a danger that is open and apparent to him, yet we cannot go to the extent of holding that, in the absence of such apparent danger, he may not rely upon the failure to give the customary signal and proceed without that degree of care which would be required at an unflagged crossing, without being guilty of contributory negligence as a matter of law. When the facts upon which they are based are carefully analyzed and considered, it will be found that a goodly portion of the cases just cited go no further than this, and we think that the following authorities clearly support our view: *Wolcott v. New York & L. B. R. Co.*, 68 N. J. L. 421, 53 Atl. 297; *Dolph v. New York, N. H. & H. R. Co.*, 74 Conn. 538, 51 Atl. 525; *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 508, 79 S. W. 930; *Chicago & A. R. Co. v. Blaul*, 175 Ill. 183, 51 N. E. 895; *Roby v. Kansas City S. R. Co.*, 130 La. 880, 58 South. 696, 41 L. R. A. (N. S.) 355.

The evidence justifying the finding made by the jury that the customary signal was on this occasion omitted, sustains the charge of negligence on the part of the appellant and precludes a holding that respondent was guilty of contributory negligence as a matter of law. The judgment therefore must be, and is, affirmed.

PARKER, C. J., FULLERTON, BRIDGES, and MITCHELL, JJ., concur.

[No. 16742. Department One. January 27, 1922.]

E. R. PATTERSON, *Appellant*, v. OREGON-WASHINGTON
RAILROAD & NAVIGATION COMPANY *et al.*,
Respondents.¹

RAILROADS (64)—ACCIDENTS AT CROSSINGS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of plaintiff's contributory negligence in attempting to drive an automobile over a railroad crossing on a city street at a time when a train was approaching is one for the jury and not for the court, where plaintiff relied upon the crossing flagman for warning, which was not given in sufficient time, and in addition had taken some precautions for his safety, and had not heedlessly driven upon the track.

Appeal from a judgment of the superior court for Lewis county, Clifford, J., entered April 7, 1921, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a collision between an automobile and a train. Reversed.

C. A. Studebaker and Forney & Ponder, for appellant.

Bogle, Merritt & Bogle, for respondents.

TOLMAN, J.—This is another of the all too frequent railroad crossing cases. Appellant sued to recover for personal injuries received by him in a collision between a passenger train operated by respondent and an automobile driven by himself. The accident occurred on August 8, 1920, in the city of Chehalis, at a place where one of the principal streets crosses respondent's main line tracks. The case was tried to a jury, and a verdict rendered in appellant's favor for \$12,000. On respondent's motion for judgment *non*

¹Reported in 203 Pac. 931.

Jan. 1922]

Opinion Per TOLMAN, J.

obstante veredicto, the verdict was set aside and the action dismissed, from which result this appeal was taken.

The evidence was conflicting upon almost every point involved in the case, and to give a true picture of the situation would require a long and somewhat intricate statement of the evidence, which, in the light of the conclusion we have reached as to the law applicable, we deem unnecessary. It is sufficient to say that there was evidence from which the jury might have found that the appellant, at the time in question, was driving a Ford roadster down a slight grade toward the railroad crossing; that there were certain obstructions to his view to the north, from which direction the train was approaching; that only at particular places was the view unobstructed for any considerable distance. There was a flagman stationed at the crossing whose duty it was to warn travelers on the street of approaching trains. Appellant approached the crossing at a moderate or slow speed. At various times and places, he and his companion riding with him looked both north and south and listened for approaching trains, but saw and heard nothing. At one place where appellant looked he estimated he could see to the north for 500 feet, but no train was in view at that time. Thus approaching the crossing, appellant saw the flagman to his right on the east side of the street with his flag under his arm, talking to some men. Seeing the flagman apparently thus in a position to discharge his duties, and having seen and heard nothing of an approaching train, appellant threw his clutch into high gear, speeded up and proceeded to cross the tracks, but as he nearly reached the first or north-bound track, the flagman ran toward him and gave a stop signal. Appellant immediately threw on his brakes hard, and

his car skidded and came to a stop with the front wheels on the south-bound track. The train was then about 150 feet from him approaching rapidly, and though he tried to back off the track, before he could do so, the train struck his automobile, resulting in the injuries complained of.

Respondent attempts to demonstrate by the physical facts that, if appellant had looked when he should, at intervening points between or beyond the obstructions mentioned, he must have seen the approaching train in time to have avoided the accident; but there are two sufficient answers to this contention: First, the speed of both the train and the automobile was based upon estimates only and the measurements are more or less disputed; hence, under the rule announced in *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A 943, this is not a yard-stick case; and secondly, and more certainly, this case comes under the rule laid down in *Ray v. Hines*, ante p. 530, 203 Pac. 929. It appearing that appellant relied upon the flagman for warning, took some precautions in addition for his own safety, and did not heedlessly and blindly drive upon the tracks, knowing the train was approaching, the question of respondent's negligence and appellant's contributory negligence may not here be decided as a matter of law, but were for the jury to determine. The recent case of *Swanson v. Puget Sound Elec. R.*, ante p. 4, 202 Pac. 264, lends support to this position.

We conclude that the learned trial court erred in granting the motion for judgment *non obstante verdicto*, and the case is remanded with directions to pass upon the motion for a new trial.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

Jan. 1922]

Opinion Per TOLMAN, J.

[No. 16767. Department One. January 30, 1922.]

EUGENE S. RUMBAUGH, *Respondent*, v. F. M. JORDAN
et al., *Appellants*.¹

MORTGAGES (132, 143)—FORECLOSURE—DEFENSES—EXTENSION OF MATURITY OF DEBT. In an action to foreclose a mortgage, the defense that its maturity had been extended for a period of three years is not established by evidence showing the mortgagee offered an extension for that period at an interest rate of seven per cent, and it appears that the mortgagor had notified his agent to get the money at six per cent or at any rate better than the mortgagee's proposition, and that, on the agent's taking the matter up with the mortgagee, the latter withdrew his offer of an extension.

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered February 5, 1921, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Jesse Thomas, for appellants.

W. W. Keyes and *J. H. Blakiston*, for respondent.

TOLMAN, J.—Respondent brought this action to foreclose a real estate mortgage. Appellants defended upon the ground that, by agreement, the maturity of the mortgage had been extended for a period of three years. From a decree of foreclosure they appeal.

The burden was upon the appellants to establish their affirmative defense, and they sought to do so by introducing a letter from respondent, dated December 7, 1920, ten days before the maturity of the mortgage debt, in which he says:

“You may renew it for another three years if you wish at seven per cent.”

and by showing that, immediately upon receipt of this letter, they wrote their agent in Tacoma, a Mr. Young, as follows:

¹Reported in 203 Pac. 968.

"I am enclosing herewith copy of letter just received from Mr. Rumbaugh.

"If you can get this money for 6 per cent, what I am now paying for it, let me know at once. Or if you can do any better than the Rumbaugh proposition."

Young, upon receipt of this letter on December 10, 1920, showed it to respondent, and entered into negotiations with respondent, in the course of which he sought to convince respondent that he should renew the loan at six per cent interest, finally offering to compromise by renewing it at six and one-half per cent. Young does not claim that any agreement for renewal was then made, but does testify that, as he understood it, the matter was still left open so that respondent's offer might still be accepted. Upon the other hand, respondent's version of the conversation had with Young on December 10 is clear, explicit and emphatic to the effect that Mr. Young said Jordan would not renew at seven per cent; that he, Young, could get the money from another party who had one hundred thousand dollars to loan at six per cent; that he asked for and received the abstract for the purpose of having it brought down to date for use in procuring a new loan, and that though Young did offer to compromise by paying interest at the rate of six and one-half per cent, respondent absolutely and unqualifiedly rejected the proposed compromise and said that he would have nothing more to do with Young or with the matter of extension; that Young should go ahead and close the matter with the man who had one hundred thousand dollars to loan, and "I says, 'this ends this talk. You take this abstract of title over to the office and make your loan with your one hundred thousand dollar party,' and I left." Thereafter, and on December 14, Mr. Young testifies that he orally accepted respondent's offer of extension, having in the meantime re-

Jan. 1922]

Opinion Per TOLMAN, J.

ceived authority from his principal so to do, but that respondent then claimed that his offer was withdrawn at the conference of December 10 and he had thereafter made arrangements to loan the money elsewhere. There is other testimony in the record more or less persuasive, but we do not consider it necessary to set it forth.

Appellants, while contending that Young's version of the conversation which he had with respondent on December 10 is the correct one, seem to urge that, if they are wrong in this, and if the facts are as stated by respondent, still there was no rejection of the offer of extension at the time because Young had no authority to accept or reject the offer; his authority being shown by the letter to him hereinbefore quoted, which letter was shown to and read by respondent at that time. We may agree that the letter, if strictly construed, does not give Mr. Young any authority to accept respondent's offer, but we cannot agree that it does not give Young apparent authority to reject the offer. Clearly the statement, "if you can get this money for 6 per cent, which I am now paying for it, let me know at once. Or if you can do any better than the Rumbaugh proposition." indicates an intention to authorize Young to engage the money at six per cent, or anything better than the seven per cent offered by respondent, and when Young did advise respondent that he had engaged, or could engage, money at six per cent, respondent was justified in believing from the letter shown him that Young had authority so to do, and that therefore, and as a natural consequence, his offer to extend was rejected. The trial court heard the witnesses and found the facts to be in accordance with respondent's version, which finding we think is fully justified by the record. Appellants, therefore, failed

to establish by a preponderance of the evidence that an extension had been agreed upon.

The judgment of the trial court must therefore be, and it is, affirmed.

PARKER, C. J., FULLEBTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16611. Department Two. February 3, 1922.]

NORTH COAST POWER COMPANY, *Respondent*, v. PITTOCK
& LEADBETTER LUMBER COMPANY, *Appellant*.¹

WATERS AND WATER COURSES (83)—PUBLIC SUPPLY—RATES—SERVICE TO PRIVATE CONSUMER—CHARGES FOR FIRE PROTECTION. A water company which supplies water for ordinary use and also a service for protection in case of fire is entitled to charge for such fire protection in addition to the customary meter rates for the ordinary consumption of water.

Appeal from a judgment of the superior court for Clarke county, Hewen, J., entered March 1, 1920, upon findings in favor of the plaintiff, in an action to recover water charges, tried to the court. Affirmed.

Crass & Hardin, for appellant.

Miller & Wilkinson, for respondent.

MAIN, J.—The purpose of this action was to recover a balance claimed to be due for water service. The trial before the court without a jury resulted in findings of fact, conclusions of law and a judgment sustaining the right to recover. The defendant appeals. The respondent is a corporation and supplies the city of Vancouver and its inhabitants with water for fire protection and domestic uses. The appellant is a corporation and owns and operates a sawmill situated within the city limits. In the sawmill there has been

¹Reported in 204 Pac. 180.

Feb. 1922]

Opinion Per MAIN, J.

installed a system of stand pipe with hose connections to be used in the event of fire. The respondent supplies the appellant with water for its ordinary use through a three-inch meter and this is paid for at the meter rate. The pipe leading to the meter and leading from it is a six-inch pipe. Around the meter is a by-pass which in the event of fire will permit the water to flow through the six-inch pipe without passing through the three-inch meter.

The service for which recovery is sought is that which is furnished for fire protection, and not the meter service for ordinary use, which had been paid for from time to time. The charge for service for the fire protection was made in accordance with the schedule of rates filed with the public service commission of this state. There is no question here of the reasonableness of the rate. The question is solely one of whether the respondent has the legal right to charge for fire protection service in addition to that charged through the meter for ordinary use of the mill.

In order to equip itself to furnish fire protection service it was necessary for the respondent to have larger mains, higher pressure, and greater reserve capacity than would be required for ordinary domestic use. The water for ordinary use was one thing and the water to be used in the event of fire was a separate and distinct service. The one passed through the three-inch meter and the other, in the event that it was needed, would go through the by-pass and be used in connection with the stand pipes with the hose connection.

A similar question was before the supreme court of Minnesota in *Gordon & Ferguson v. Doran*, 100 Minn. 343, 111 N. W. 272, and it was there held that, in addition to the meter rate for the ordinary use, an addi-

tional rate could be charged for the service rendered for fire protection. It was there said:

“When, however, a sprinkling connection is made with private premises, the situation is materially different. These premises and the primary causes of catastrophe to the building and of the consequent possible use of disastrous quantities of water are primarily under the control, not of the public, but of the owner. A peculiar personal service is provided for his benefit, which is not enjoyed in common by the community in general, but is available only to a limited class of individuals. It does not advance the reasoning in this connection to split hairs between the ‘use’ and the ‘consumption’ of water. As a matter of good sense the property owner beneficially employs the water mains for his own purposes and to his own advantage, although he may not, except in case of fire, actually draw any water from the pipes. It is necessary and proper that for this he should pay. In effect he gets something of pecuniary value from another, which that other is not compelled to give except on the basis of contract.”

There is no legal reason why the appellant receiving the service for fire protection should not pay therefor in addition to the meter rate which it pays for the ordinary daily use. There is nothing in § 8626-52 of Remington’s 1915 Code (P. C. § 5579), which is out of harmony with this view.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, BRIDGES, and HOVEY, JJ., concur.

Feb. 1922]

Opinion Per Curiam.

[No. 16525. Department One. February 3, 1922.]

*In the Matter of the Estate of JOHN BELL.**MARGARET B. HARKINS, Appellant, v. MARY I. ANDERSON et al., Respondents.*¹

APPEAL (268)—RECORD—EVIDENCE—SPECIAL PROCEEDINGS. Where the statement of facts in a will contest on the ground of undue influence and incompetency has been stricken on appeal, the decree of the lower court will be affirmed when it is supported by findings that the deceased in making the will was not acting under any duress, fraud or undue influence, that he was fully competent to execute the will, and that it was in all respects executed and proved according to law.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 24, 1921, in favor of the defendants, dismissing a will contest, tried to the court. Affirmed.

Giles C. Rush, for appellant.

McCarthy, Edge & Lantz, for respondents.

PER CURIAM.—The last will and testament of John Bell, deceased, was duly probated in the superior court of Spokane county on June 3, 1920. By this action the contestant sought to have the will declared null and void and to set aside the probate thereof. The grounds of the contest, as stated in the pleadings, were that the deceased, at the time of making his will, was old, feeble and mentally incompetent to make a will, and that he executed it because of undue influence on the part of certain persons named in the petition. The contestant has appealed from a decree of the court refusing to declare the will void, refusing to set aside the previous probate thereof, and dismissing the contest suit.

¹Reported in 204 Pac. 180.

The statement of facts has heretofore been stricken by this court. The only question for us to decide is whether the findings of the court support its decree. The findings were to the effect that, in making the will, the deceased was not acting under any duress, fraud or undue influence, and that he was fully competent to make and execute the will, and that it was in all respects executed and proved according to law.

The judgment is affirmed.

[No. 16583. Department One. February 3, 1922.]

JOHN HUFFMAN *et al.*, *Appellants*, v. ELLEN MINING COMPANY *et al.*, *Respondents*.¹

EXECUTION (5)—PROPERTY SUBJECT—PERSONAL PROPERTY—INTEREST IN PUBLIC LANDS. A locator's interest in an unpatented mining claim is personalty rather than realty, and hence capable of sale under execution as personal property.

CORPORATIONS (52)—STOCK—CONSIDERATION FOR ISSUANCE—ESTOPPEL TO ALLEGE INVALIDITY. One holding a valid subsisting lien against mining claims, does not lose it by an invalid attempt to sell the property under foreclosure; and a sale of the claims to a corporation in consideration of corporate stock would transfer an equitable right to the lien and would afford at least partial consideration for a transfer of the corporate stock.

SAME (88)—STOCKHOLDERS—SUITS ON BEHALF OF CORPORATION—ESTOPPEL. In an action by stockholders to cancel an issuance of stock to an individual on the ground of failure of consideration in that the shares had been issued to him in exchange for mining claims which he as a judgment creditor had acquired under an invalid foreclosure of a mining lien, an offer to reimburse him to the extent of his judgment would not place him in *statu quo*, but he would be entitled to a reconveyance of the mining property subject to the corporation's after acquired title, so that he could exercise his right of resale.

SAME (88). Any principle of estoppel operative against a corporation applies against stockholders who exercise the right to sue on the refusal of the corporation to bring suit.

¹Reported in 204 Pac. 197.

Feb. 1922]

Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered January 21, 1920, upon findings in favor of the defendants, in an action to cancel corporate stock, tried to the court. Affirmed.

Mulligan & Bardsley, for appellants.

Del Cary Smith and *C. W. Greenough*, for respondents.

FULLERTON, J.—This action was instituted by the appellants, plaintiffs below, to set aside and cancel certain corporate stock of the respondent Ellen Mining Company, issued to the individual respondents. In the complaint it is alleged that the stock sought to be set aside and cancelled was issued because of fraud and deceit practiced upon the corporation by the respondent Harsh, the deceit consisting of his misrepresentation as to his title to the property conveyed to the corporation, which furnished the consideration for the stock. On a trial of the facts, after issue joined, the court ruled against the appellants' contentions and entered a judgment confirming the title to the stock in the respondents. It is from this decree that the appeal is prosecuted.

From the facts developed on the trial, it appears that a corporation called the Silver Lead Mining Company held, by assignment from the original locators, and was in possession of, certain unpatented mining claims located in the Metaline Mining district, in Pend Oreille county; that the corporation employed the respondent Harsh to perform the assessment work necessary to be performed in the year 1913 to prevent the claims from lapsing; that Harsh performed the work, but was not paid for his services, and in August, 1914, filed a lien upon the claims in the sum of \$368; that thereafter he foreclosed the lien, obtaining a de-

cree of foreclosure against the corporation and an order of sale of the property for the amount of his claim, with interest and costs. It further appears that, in executing the decree and order of sale, the sheriff, into whose hands the decree and order was placed for execution, levied upon the claims, advertised them for sale, and sold them as personal property is sold on execution under the statutes of this state; that, based upon the title thus obtained, Harsh, his co-respondents joining with him, organized the respondent corporation and conveyed to it, in consideration of its entire issuance of stock, the mining claims; that of this stock Harsh donated about one-half to the treasury and reserve fund of the corporation as the basis for a working capital, and that he and his associates retained the remainder. It further appears that certain of this treasury stock was issued to the holders of stock in the original corporation in exchange for the stock of that corporation, and certain of it was sold purchasers in the open market, and that the appellants are stockholders in the Ellen Mining Company, acquiring their stock by one or the other of these means. It also appears that, at a stockholders' meeting of the Ellen Mining Company held sometime after its organization, the question was mooted whether the corporation had title to the mining claims, and that a committee was appointed to obtain legal advice upon the question and to take such steps as might be found necessary to perfect the title if it should be found imperfect. What the advice of the attorney consulted was does not appear, but it appears that, through his assistance, a deed from the Silver Lead Mining Company, conveying all its right, title and interest in and to the mining claims to the Ellen Mining Company, was obtained and recorded.

Feb. 1922]

Opinion Per FULLERTON, J.

Turning to the contentions of the appellant, the first is that there was actual fraud in the transaction through which Harsh obtained the capital stock of the Ellen Mining Company. This contention, however, does not require argument. The trial court found that the parties to the transaction acted in the utmost good faith, and we find nothing in the evidence which even tends to a contrary conclusion.

The further contention is that there was constructive fraud, in that the stock was acquired by Harsh without consideration. This contention is founded on the claim that Harsh had no title to the mining claims which he transferred to the corporation. It is argued that a locator's interest in an unpatented mining claim is real property, which must be sold under execution as real property is sold, and since the sale in this instance was made as a sale of personal property, no title passed to Harsh by the sale, and hence Harsh had no title which he could convey to the corporation. Counsel have cited a number of authorities from other jurisdictions as supporting the rule, but these we shall not review. Many of them are made to rest on statutes local to the jurisdiction in which the sales were had, and in so far as the others support the contention, they are contrary to our own case of *Phoenix Mining and Milling Co. v. Scott*, 20 Wash. 48, 54 Pac. 777. In that case we held that the possessory right which a person acquired by the location of a mining claim, under the statutes of the United States, is not such an interest as will support the lien of a general judgment within the meaning of our code making such a judgment a lien upon "the real estate of the judgment debtor." If this be the rule, it would seem necessarily to follow that the interest acquired is personal rather than real, and being personal, it could be sold under execution as personal property is so sold.

But it is not necessary to rest our judgment on the foregoing reason, as there is another which estops the appellants from asserting want of consideration. Harsh had a valid subsisting lien upon the claims. This he foreclosed, and not only obtained a judgment against the then owner of the claims, but a decree and order directing the sale of the specific property to satisfy the judgment. This right of sale would not be exhausted by an invalid attempt to exercise it, and if the sale actually made was invalid, the right still existed in Harsh. He possessed the right at the time he made the conveyance of the claims to the corporation, and the conveyance then made, while not in form a conveyance of the decree and the right of sale thereunder, was sufficient in equity to pass to the corporation Harsh's beneficial interests therein. These interests were of value, and their acquirement by the corporation manifestly furnished some consideration for the corporate stock transferred to Harsh. It may be that it was only a partial consideration, and it may be that, did the evidence justify it, the court would ascertain the value of the interest in the property actually conveyed and the value of the interest had it been what the parties all supposed and intended it to be, and allow a proportional recovery, but the evidence was not directed to that end. The evidence was directed to a showing of an entire failure of consideration. On this question the evidence fails, and as there is nothing on which a partial recovery can be based, no form of relief can be granted.

On the trial of the cause the appellants offered to reimburse Harsh to the extent of his judgment. But this would not, as counsel argues, fully reimburse him or place him in *statu quo*. Nothing short of a re-conveyance of the property, subject to the corporation's after-acquired title, so that he could exercise his right

Feb. 1922]

Statement of Case.

of resale, would place him in that position. This was not tendered him, and the courts will not compel him to accept anything less.

We have not overlooked the fact that this is a suit by stockholders of the corporation and not by the corporation itself. But the right of stockholders to sue in cases of this sort arises from the fact that the corporation itself refuses to sue. The stockholders are but exercising a right which the corporation refuses to exercise, and their rights are no greater than the rights of the corporation. Any reason, therefore, which would estop the corporation from recovery will estop them.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16603. Department One. February 4, 1922.]

C. D. WILBERT, *Respondent*, v. SAMUEL O. STURGEON
*et al., Appellants.*¹

MUNICIPAL CORPORATIONS (379)—STREETS—NEGLIGENT USE—COLLISION AT CROSSING—LAW OF ROAD—VIOLATION OF ORDINANCE. Where a collision occurs between an automobile and a bicycle, both of which were proceeding on the wrong side of the street, the bicycle rider is not chargeable with contributory negligence, if he had been forced into that position in an effort to avoid the negligence of the driver of the automobile.

PLEADING (181)—VARIANCE—MATERIALITY TO ISSUE. A complaint alleging that a collision between vehicles occurred "about three feet from the curb, at the northwest corner" of two streets, while the proof showed the accident was some twenty feet north of that point, does not constitute a fatal variance, when there is no showing the defendant was misled by the pleading.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered December 28,

¹Reported in 204 Pac. 185.

1921, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

E. Eugene Davis and *H. E. T. Herman*, for appellants.

Hamblen & Gilbert, for respondent.

FULLERTON, J.—In this action the respondent recovered against the appellants for personal injuries and for damages to his bicycle, caused, as he alleged, by the negligence of the appellants in driving their automobile over him while he was riding the bicycle on a public street of the city of Spokane. The action was tried in the court below without the intervention of a jury. The evidence was not brought up with the record, and the cause is before us on the findings of fact made by the trial court.

The findings show the following facts: Sprague avenue and Stevens street are public streets of the city of Spokane, the former extending east and west and the latter north and south, the streets intersecting each other at right angles. Prior to the accident, the appellants were driving their automobile east on Sprague avenue, and the respondent was riding his bicycle west thereon, each on his proper side of the street, and each approaching the intersection of the street with Stevens street. Both of the parties reached the intersection of the streets at about the same time. On reaching the intersection, the appellant turned his automobile to the north, intending to go north on Stevens street, and in doing so passed over the center of the intersection of the street, instead of circling around it to the right as the traffic ordinances of the city required. The respondent, on entering the intersection, passed straight across it until he had reached a point beyond its center, intend-

Feb. 1922]

Opinion Per FULLERTON, J.

ing to turn south on Stevens street. As he was about to make the turn, he observed the appellants' automobile heading towards him, and to escape it turned and rode in a northwesterly direction until he was within four feet of the curb at the northwest corner of the intersection, when he turned north on the west side of Stevens street and had proceeded for about twenty feet, when he was overtaken and struck by the appellants' automobile. The court further found that, as the appellant was turning at the intersection, an automobile which was standing on the east side of Stevens street near its intersection with Sprague avenue began backing from its position into the street, and that the appellant turned towards the respondent in order to avoid contact therewith. A further finding was made to the effect that the respondent was not guilty of contributory negligence.

The court concluded that the appellants were negligent in that they had violated the traffic ordinance of the city of Spokane by running over the center of the intersection of the streets instead of circling around it; that they were negligent in turning to the west side of Stevens street instead of stopping when the other automobile backed out from the curb; that they were negligent in failing to stop their car, or so control and restrain it as to refrain from running into and over the respondent when they learned that the respondent was ahead of the automobile; and that they were negligent in that they did not have proper control of their automobile.

Arguing in support of their contention that the findings do not support the conclusions, or the judgment awarded, the appellants say:

“It must be seen that according to the court's findings . . . that the conduct of plaintiff and de-

fendants, in so far as the operation of their vehicles on the streets of Spokane is concerned, was identical. Both swung their vehicles to the wrong side of Stevens street and the collision occurred there. But the findings show that the defendants had a lawful excuse for so doing, while the plaintiff had none. Defendants, according to the court's findings, swung their automobile to the west side of Stevens street to avoid being struck by an automobile backing out from the curb on the east side of Stevens street. Plaintiff rode his bicycle in a converging path to the place where (the driver of the automobile was heading) to avoid, to quote the court's words, 'the imminent danger in which he was thus placed'. But according to the court's own findings, and according to the plaintiffs' complaint, and according to all the testimony, the plaintiff was placed in no imminent danger from any source, certainly not from any act of defendants."

But we cannot think these just deductions from the record. Since the evidence is not before us, we cannot, of course, know what may be shown thereby. Nor do we find anything in the complaint that would lead to the conclusion that the respondent was at no time placed in imminent danger by the acts of the driver of the automobile. The complaint is less minute in detailing the circumstances giving rise to the accident than are the findings, but there is no substantial difference between them. Nor do we think the findings show that the situation of the parties, at the time of the accident, were identical. Both of the parties were on the wrong side of the street at that time, it is true, but the respondent was not there voluntarily or from choice; he was there to escape the peril that the appellants' primary violation of the city ordinance had placed him in—to escape the peril in which he was placed by the act of the driver of the automobile in crossing the intersection of its streets over its center

Feb. 1922]

Opinion Per FULLERTON, J.

instead of circling around it. Unless the respondent, in thus being on the wrong side of the street, acted other than as an ordinarily prudent person would have acted under like or similar circumstances, he was not guilty of negligence, and manifestly it cannot be concluded that he did not so act, from the facts as found. On the other hand, no necessity compelled the driver of the appellants' automobile to be on that side of the street. If the backing automobile interfered with his direct course, it was his duty to slow up or stop until the course was clear before proceeding. He had no right to turn into the wrong side of the street, when by so doing he would put the respondent in danger.

Other objections are made to the sufficiency of the findings, but we do not think they require special consideration. In our opinion, the findings show negligence in the several particulars found by the court, and are plainly sufficient to support a judgment founded thereon.

It is further contended that there is a fatal variance between the facts constituting the negligence, as alleged in the complaint, and the facts constituting negligence as found by the court. The difference pointed out is that the respondent, in his complaint, did not correctly describe the position and course of the appellants' automobile immediately preceding the accident, and described the place of the collision as occurring "about three feet from the curb, at the northwest corner of said Sprague avenue and Stevens street," whereas the collision occurred, as found by the court, some twenty feet north of this point. But these, if variances at all, are not fatal variances. They were not of the substance of the issues. They could require reversal only in the case they misled the appel-

lants to their injury, and of this there is nothing in the record.

The judgment is affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 16607. Department One. February 4, 1922.]

HERBERT B. KAUFMAN *et al.*, *Appellants*, v. HARRY H.
HEWITT *et al.*, *Respondents*.¹

SHIPPING (6)—CONTRACTS—CONSIDERATION—FRAUD. Where plaintiffs leased a boat of defendants for salmon fishing in Alaska waters under a contract requiring the lessees "to purchase a purse seine net suitable in size and quality for salmon fishing," for whose purchase price the lessors gave their promissory notes, the lessors cannot be held liable thereon for the purchase by the lessees of a net of insufficient size, represented as complying with the contract, but which was old, worn and rotten, though one of the lessors had seen it before giving the notes, but had not inspected it.

SAME (9)—BREACH OF CHARTER BY CHARTERER. Where the lessees of a fishing boat agreed as part of their contract to purchase a seine net, care for it while in their possession, and return it to the lessors at the close of the fishing season in as good condition as it then was, they were bailees of the seine net, and chargeable with its loss as a result of their own negligence.

SAME (9, 14)—BREACH—ACTIONS. In an action growing out of a contract for the lease of a boat during the salmon fishing season under which the lessors were to receive a proportion of the sum realized from the sale of fish caught during the season, a finding by the court on contradictory evidence that the lessees did not engage in fishing and that the value of the use of the boat during the fishing season was \$50 per day, will not be disturbed on appeal.

SAME (9)—BREACH—DAMAGES—MEASURE OF DAMAGES. Where a boat was leased for an Alaska salmon fishing season on the basis of a proportionate share in the catch, and the boat did not engage in fishing, the proper measure of damages is the value of the use of the boat computed on the number of days the fishing would have been profitable.

¹Reported in 204 Pac. 199.

Feb. 1922]

Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for King county, Reynolds, J., entered April 29, 1921, upon findings in favor of the defendants, in an action on contract, tried to the court. Modified.

A. G. Laffin and *W. C. Hinman*, for appellants.

Howard O. Durk, for respondents.

FULLERTON, J.—This action has its foundation in a written contract, entered into on April 27, 1920, by the appellants on the one side and the respondents on the other. The contract is long and somewhat minute in its details, and its substance only needs be set forth. In the contract it is recited that the respondents are the owners of a certain boat known and registered as the "Decision", which boat is suitable for use in salmon fishing, and that the appellants are desirous of securing the use of the boat for salmon fishing during the fishing season of 1920. It is then agreed that the respondents will lease the boat to the appellants for the fishing season named, and will send along with the boat one of their number to act as engineer of the boat and to perform other services thereon when needed and when the work can be performed without interfering with his duties as engineer; that the appellants will hire the boat and will use it in salmon fishing during the full fishing season of 1920, "or as long as the fishing is good enough to warrant continuance of the same, of which fact they shall be the sole judges"; that the appellants shall purchase a purse seine net of suitable size and quality for salmon fishing to be used on the boat, and make such initial payment on the same as may be necessary to procure it; that they will take proper care of the boat and its equipment while in their possession and return the same with its equipment to the respondents at the close of the fishing

season in as good condition as they were when received, ordinary wear and tear excepted; that they will care for the purse seine in a good and workmanlike manner and will give it good and proper treatment so as to preserve it until the next fishing season, barking it and doing all other things necessary in the premises; and that they will loan to the respondents the sum of \$625 to be used in paying certain indebtedness against the boat "Decision", and for other specified purposes, which sum shall be secured by mortgage upon the boat. It was further agreed that the respondents will make all payments on the purchase price of the purse seine subsequent to the initial payment as the same become due, and at the end of the fishing season will repay the appellants the amount of their initial advancement upon the purchase price of the net. It was mutually agreed that from the gross sum received for the sale of fish caught during the fishing season there should be deducted all moneys expended or advanced by either of the parties to the contract after the delivery of the boat to the appellants, for supplies, fuel, and incidentals. It was further mutually agreed that

"Two-sevenths of the remaining sum less the sum paid by the parties of the second part as the initial payment on the said purse seine net shall be paid to the parties of the first part, the remaining sum shall be paid to the parties of the second part, and it is further agreed that if there is not sufficient money received by the sale of the fish caught by the said 'Decision', of Tacoma, during the present fishing season to pay all of the expenses for supplies, fuel and incidental expenses and for the said purse seine net, in full, and for any other sum that may be owing to the parties of the second part by the parties of the first part, including the total purchase price of the said purse seine net, which will in that event be paid by parties of the second part, then and in that event the parties of the second part agree to accept, and the

Feb. 1922]

Opinion Per FULLERTON, J.

parties of the first part hereby agree to make, execute and deliver to the parties of the second part a mortgage on the said boat 'Decision', of Tacoma, as security for the payment of the said sums enumerated in this paragraph, which mortgage shall be payable one year from the date of execution thereof with interest at the rate of 3% per annum and in the usual standard form. In event of loss on incidental expenses, parties of the first part will be held for 2/7 of such loss."

The action was instituted by the appellants. In their complaint, after setting forth the contract, they allege that, acting pursuant thereto, they purchased a purse seine net at a cost to themselves of \$2,200, and had made certain advancements in the execution of the contract, which sums had not been repaid to them, and that the respondents had refused to execute a mortgage on the vessel named in the contract to secure the same. The relief sought was a "decree ordering the defendants to comply with the terms of the contract, and to make, execute and deliver to the plaintiffs a mortgage on said boat 'Decision' to secure the sums."

The answer of the respondents, after making certain denials, affirmatively set up that they had executed and delivered to the appellants their notes for the alleged purchase price of the net, that they had executed a mortgage on the boat for certain moneys loaned them by the appellants; that the appellants had been guilty of fraud in purchasing the net, had carelessly, negligently and fraudulently suffered the same to be lost, because of which it could not be returned to the respondents; and that they had breached the contract in other respects, to the damage of the respondents greatly in excess of the amount of the loan. The relief sought by them was a cancellation of the notes and mortgage and for a judgment over against the appellants.

The cause was tried to the court sitting without a jury. Summarized, the findings were these: (1) That, acting under and in pursuance of the agreement, the appellants found and purchased a second-hand purse seine net, which they represented and stated to the respondents was suitable for the purpose intended, and which cost the sum of \$2,200; that the respondents, believing such representations, executed and delivered to the appellants their promissory notes for the amount of the purchase price. (2) That the net purchased was not suitable for the purposes intended, in that it was not of sufficient size, and was old, worn and rotten, and would tear under slight pressure. (3) That the corks were detached therefrom, and the net placed on the boat's turntable for carriage to Alaska was insecurely fastened, being held down by a canvas fastened to the turntable by laths nailed around the edges of the canvas; that the net was lost by being washed overboard when the boat was passing through tide rips while it was about eighteen hours out at sea on its way from Seattle to Alaska; that the boat continued on its way to Alaska and arrived there without a fishing net; that the appellants did not engage in fishing, although salmon were running during the fishing season; that they kept the boat in their possession until nearly the close of the fishing season, during which time they employed it to other uses, appropriating its earnings to themselves. (4) That, before leaving for Alaska, the appellants had the net insured in their own names, giving as a reason therefor that they were responsible for its return to the respondents under their contract. (5) That the boat was put in proper repair and properly fitted for fishing when it was delivered to the appellants. (6) That the appellants loaned the respondents the sum of \$1,125, taking as security therefor a mortgage upon the boat,

Feb. 1922]

Opinion Per FULLERTON, J.

which mortgage was properly recorded. (7) That the appellants expended the sum of \$600 in fuel, equipment and supplies for the vessel while in their possession. (8) That the appellants violated their agreement in that they did not engage in fishing for salmon with the boat; that the respondents received no compensation for the use of the boat, and that the value of its use during the fishing season was \$50 per day.

As conclusions of law, the court found that the appellants were responsible for purchase of the net, that it was worthless, and that there was no consideration for the notes given them for its purchase price; that the respondents were damaged by the appellants' breach of the contract to engage in fishing in the sum of \$50 per day during the fishing season, and that, after deducting this sum from the amount due on the notes, plus the sum the appellants paid for the fuel, equipment and supplies, there remained a balance due the respondents in the sum of \$457.50.

Judgment was entered in favor of the respondents for the last mentioned sum, and this appeal followed.

The appellants' argument on the appeal is mainly directed to the sufficiency of the evidence to justify the findings of the court. With respect to the net, the evidence, in our opinion, decidedly preponderates in favor of the findings. By the terms of the contract, the duty rested upon the appellants "to purchase a purse seine net suitable in size and quality for salmon fishing to be used on the boat 'Decision'," and they not only purchased a net, but represented by both words and conduct that it was such a net as they were required to purchase by the terms of the contract. These were representations on which the respondents had a right to rely, and the evidence is that they did rely thereon. It is true that one of the respondents twice saw the net prior to the execution and delivery

of the notes, but his testimony is that he gave it no more than a cursory examination, and did not then discover, or observe anything that would cause him to suspect, that the net was not as it was required and represented to be. The evidence is clear that the net was worthless. The fact is not only so stated by a number of disinterested witnesses, but the appellants' subsequent conduct with respect to it is strong evidence that they so considered it.

But while the trial court rested its finding that the consideration for the notes had failed for the foregoing reasons, the evidence justified a similar conclusion on a different ground. The contract provided that the appellants should care for the net while it was in their possession and return it to the respondents at the close of the fishing season in as good condition as it then was, reasonable use excepted. Under the contract, the appellants were bailees of the net and could not excuse themselves from a failure to return other than by a showing that it was lost without their fault. Here the evidence shows to the contrary. The appellants were negligent in the manner of loading the net on the boat. The net was covered with a coating of tar before loading and formed a mass weighing many hundred pounds. It was placed on an exposed part of the boat. It was not tied on in any manner, the ordinary and usual way of fastening such things, but was held in place by an ordinary canvas covering, in itself insecurely fastened to the boat. Even the corks, which would have caused the net to float and thus enabled it to be recovered in case it fell into the water, were taken off of it. Plainly its loss under such circumstances cannot be said to be a loss without fault.

The sufficiency of the evidence to justify the finding that the appellants breached the contract in failing to

Feb. 1922]

Opinion Per FULLERTON, J.

engage in fishing is also questioned. But while the evidence on the question is conflicting, we are unable to say that it preponderates against the court's finding. It will be remembered that, when the boat reached Alaska, it was not prepared to fish. It had no fishing net, and no effort was made to procure one. The boat was used at such odd jobs as could be found until the fishing season was practically ended, when it was returned to the respondents at the place it then was. While the fish may not have been running in their usual numbers, other parties with similar boats found the fishing profitable. The contract was to engage in fishing, and a failure to so engage was, under the circumstances, a breach of the contract.

But we think that the court allowed too large an amount as the respondents' measure of damages for the breach of the contract. The evidence justifies the finding that the use of the boat was of the value of fifty dollars a day during the fishing season, but we are unable to conclude that the finding as to the number of days the fishing would have been found profitable was justified. The exact number of days' fishing that would have been found profitable is difficult of determination from the evidence, but we think an overcharge has been made in this respect sufficient to offset the money judgment allowed the respondents if the appellants' costs of this appeal, which might otherwise follow, be disallowed.

The judgment will therefore be modified to the extent of disallowing the money judgment awarded to the respondents, and affirmed in all other respects. Neither party will recover costs on the appeal.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16673. *En Banc*. February 4, 1922.]

LEE WRIGHT, *Respondent*, v. J. F. DUTHIE & COMPANY,
Appellant.¹

DAMAGES (118)—BREACH OF CONTRACT—LOSS OF PROFITS—EVIDENCE—SUFFICIENCY. The measure of damages for refusing to permit a contractor to complete the caulking of two vessels upon which he was engaged is the loss of profits on the whole contract, the amount of which is properly determinable by the estimates of qualified competent witnesses.

SAME (74, 118)—MEASURE OF DAMAGES—LOSS OF PROFITS—BREACH OF CONTRACT—EVIDENCE. In an action to recover lost profits by a contractor on ship construction work who had been prevented from completing the contract, the fact that the contractor worked as a laborer along with his men would not establish that his loss of time was erroneously included in addition to his loss of profits, where there was no extra claim on account of such personal service.

DAMAGES (94) — EXCESSIVE DAMAGES — BREACH OF CONTRACT. Where a shipbuilder, after cancelling a contract for caulking rivets, completed the work for a sum less than the contract price, that fact would not be controlling on the question of the contractor's loss of profits, and hence a verdict in excess of that amount cannot be ascribed to passion and prejudice on the part of the jury.

SAME (128)—MEASURE OF DAMAGES—INSTRUCTIONS. In an action for lost profits by reason of the prevention of performance of a contract, where there was neither pleading nor proof of damages for loss of time, an instruction to the jury, that, if they find for plaintiff, they should allow such an amount as will justly compensate him for the damages which have been established by the evidence, is not open to the objection that it allows them to find for plaintiff's loss of time.

TRIAL (101)—INSTRUCTIONS — REQUESTS ALREADY GIVEN. In an action upon a contract whose performance was prevented by defendant, an instruction that the measure of damages is the excess of the price plaintiff was to receive under the contract for the performance of the work over what it would have cost him to have performed the work called for in the contract being proper, it was not error to refuse a requested instruction on the same subject in different language.

DAMAGES (128)—MEASURE—BREACH OF CONTRACT—INSTRUCTIONS. Where loss of profits on a contract was all that was claimed under

¹Reported in 204 Pac. 191.

Feb. 1922]

Opinion Per MITCHELL, J.

a complaint and the evidence, a general instruction that the burden was on plaintiff to prove by a fair preponderance of the evidence the material allegations of the complaint, was sufficient.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 14, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Bogle, Merritt & Bogle, for appellant.

John F. Dore, for respondent.

MITCHELL, J.—This is an action by Lee Wright against J. F. Duthie & Company, a corporation, to recover damages for the breach of a contract by which he undertook to perform certain work upon two steel vessels under construction in the corporation's yard at Seattle. The contract was as follows:

“Seattle, Wash., March 31, 1921.

“I, the undersigned, agree to do all the chipping, caulking and packing, and to test the tanks, on the Coal Carriers known as Hulls Nos. 36 and 37, for the sum of Five Thousand Two Hundred Fifty (\$5,250) Dollars per hull.

“It is understood and agreed that this figure covers the whole cost of this work, which is to be done in accordance with the plans and specifications covering said ships.

“Lee Wright.

“We agree to the above with the understanding that said work is to be performed in a workmanlike manner and completed when needed, due allowance to be made in the event of a strike.

“J. F. Duthie & Co.

“By J. F. Duthie, President.”

It was alleged that the plaintiff entered upon the performance of the contract, and that defendant, without reasonable excuse, refused to permit him to complete it, whereby he was damaged in the sum of \$4,500.

The defendant answered that plaintiff breached the contract by the unworkmanlike manner in which he performed it, for which reason defendant cancelled the contract and thereafter completed the work; and it denied that plaintiff suffered any damage. The case was tried to a jury, which returned a verdict for the full amount sued for. Defendant moved for a judgment n. o. v. or, in the alternative, for a new trial, both of which motions were denied. Judgment upon the verdict was entered in favor of the plaintiff, from which the defendant has appealed.

It is contended by the appellant that the evidence shows the respondent breached the contract and failed to prove recoverable damages. In the construction of a steel vessel the rivets are supposed to be driven water tight and tested with a hammer prior to the work of caulking and packing. Appellant contends that the riveting upon these two hulls was done in the usual manner, and that respondent refused to caulk those on the shell of the vessels without extra pay, which was refused, upon the claim that there was an excessive number of leaking rivets. On the contrary, respondent claims that the usual and ordinary driving and testing of rivets (such as was specially promised him in this case) required that not to exceed five or six per cent should require caulking, that approximately eighty per cent of these rivets were not driven water tight and needed caulking, and that, upon his reporting it, he agreed to stand one-half of the extra expense and that appellant agreed to pay the other half.

It appears that in caulking rivets proper care must be taken not to use rough or sharp tools, so as to avoid leaving the head of the rivet rough, causing it to rust quicker; and also to avoid cutting into the plate about the rivet, weakening and causing it to rust quicker.

Feb. 1922]

Opinion Per MITCHELL, J.

Appellant claims that the respondent violated this rule of good workmanship, and continued to do so over its protest. On the other hand, it is claimed by the respondent the tools used by him and his workmen, all of whom were experienced men, were proper and kept in suitable condition and that their work was good. It is also claimed that respondent's manner of caulking the rivets when the tanks of the vessel he commenced to test were under water pressure was unworkmanlike and not permissible. The respondent contends otherwise. The record shows a square conflict of the evidence on these several matters it was the province of the jury to decide.

Upon the assignment that damages were not proven, appellant claims the respondent could recover, if at all, only the difference between the contract price and the amount he and his men had been paid, plus what it would have cost him to complete the contract, including his own time. But the case was clearly one of lost profits on the whole contract. That was the theory on which it was tried. The evidence shows that the respondent and others he employed worked on the job, and that, until the contract was cancelled by the appellant, payments had been made from time to time upon the basis of \$12 per day for the respondent and each of his men, in the total sum of \$3,839.60. Respondent's evidence, from qualified competent witnesses, shows that one vessel was seventy to seventy-four per cent and the other eighty-six to eighty-eight per cent complete, from which it was submitted that the jury could reasonably draw the conclusion as to the proper amount of damages or loss of profit. Appellant objects that that basis for the verdict is merely conclusions of the witnesses and does not comply with the rule with respect to proof of prospective profits.

In the case of *Bogart v. Pitchless Lumber Co.*, 72 Wash. 417, 130 Pac. 490, it was said: "Such profits do not have to be accurately known. They are to be determined from a consideration of all of the tangible evidence upon the subject." See, also, *Nelson v. Davenport*, 108 Wash. 259, 183 Pac. 132. Further, in the *Bogart* case, after referring to several cases, it was said: "Resort must of necessity be had to the estimates of those who are competent to pass judgment and who have knowledge of the particular conditions." Appellant's own witnesses in testifying gave the percentage of the completion of the work at the time of the cancellation of the contract, which, generally, was less than that given by respondent's witnesses.

Also, in this respect, it is argued there is erroneously included in the estimate the loss of respondent's time in addition to his loss of profits. We do not so understand the proof. The estimate as to the work yet to be done and the balance to be paid under the contract price were based upon the respondent's continuing to work as he had been working. It was immaterial to the appellant who did the work, since all that was demanded by respondent as lost profits was the difference between the cost of the work and the contract price. Appellant relies on the case of *Di Luck v. Bradner Co.*, 111 Wash. 291, 190 Pac. 904. It was a case in which there was a claim of damages for lost profits in the sum of \$400, and in addition the value of the personal work plaintiff would have performed in the sum of \$238 had he been allowed to carry out the contract. In the present case, the second claim of damage is lacking. It is confined to loss of profits.

After cancelling the contract, the appellant, in completing the work on the vessels, claims to have expended such sum that it, with the amount paid to the

Feb. 1922]

Opinion Per MITCHELL, J.

respondent, equalled only \$788.14 less than the contract price. It is contended such outlay was necessary and reasonable, and that a verdict for more than \$788.14 was excessive and given under the influence of passion and prejudice. The contention, however, is but a feature of the whole controversy as to the question of profits, and certainly there is no evidence of passion or prejudice on the part of the jury if respondent's proof is true, which the jury was at liberty to believe.

Exceptions were taken to instructions that, if the jury found by a fair preponderance of the evidence appellant prevented respondent, without reasonable excuse, from completing the work and respondent was damaged thereby, they should find for him; but that if he was not damaged thereby, then they should find for the appellant. And further, that, if they find for the respondent, they should allow such an amount "as in your opinion will fairly and justly compensate him for the damages, if any, which has been established by the evidence because of defendant's preventing him from completing the work", not, however, exceeding \$4,500. Specifically, it is argued that the only damages alleged are lost profits, while the instructions do not so limit the right of recovery, but that the jury might well have understood they could allow the respondent for loss of time. What has already been said heretofore sufficiently answers the argument, as there was neither allegation nor proof of damages for loss of time.

The instruction that the measure of damages is the excess, if any, of the price respondent was to receive under the contract for the performance of the work over what it would have cost him to have performed the work called for in the contract was proper; and the refusal to give a requested instruction in different language upon the same subject was not prejudicial.

Under the facts in this case, the one requested and refused was no clearer or more appropriate than the one given.

Instructions were requested and refused to the effect that if the tools used by respondent were not proper, or if his manner of caulking the rivets of the tanks of the vessels while they were under a head of water pressure was not proper, that then the respondent broke the contract and the verdict should be for the appellant. There was a dispute as to the rule and practice in these respects as well as the kind and condition of the tools that were used, as well as the kind that should be used, and we are satisfied the jury was properly advised by the instructions with reference to whether or not appellant prevented respondent, without reasonable excuse, from completing the contract.

The court gave the general instruction that the burden was upon the plaintiff to prove by a fair preponderance of the evidence the material allegations of the complaint. Appellant claims the instruction was not sufficient where the sole recoverable damages, if any, were lost profits. But since it has been seen that loss of profits was all that was claimed by the complaint and of which any evidence was given, we think the instruction was sufficient. Other instructions requested and refused were properly refused or sufficiently covered by instructions that were given.

Judgment affirmed.

PARKER, C. J., HOVEY, MAIN, HOLCOMB, TOLMAN, MACKINTOSH, and BRIDGES, JJ., concur.

Feb. 1922]

Opinion Per BRIDGES, J.

[No. 16591. Department One. February 6, 1922.]

F. M. HELSLEY, *Appellant*, v. AMERICAN MINERAL
PRODUCTION COMPANY, *Respondent*.¹

CONTRACTS (72)—ENTIRE OR SEVERABLE CONTRACTS. Whether a contract is divisible or indivisible so as to permit the maintenance of more than one action thereon, is determinable upon the bare facts of the contract itself; and a contract is devisible where it requires a purchaser of automobile trucks to pay a certain sum on a specified date, and also to pay designated accounts and bills due and owing by the seller.

JUDGMENT (213-3) — BAR — MATTERS CONCLUDED — CONTRACTS — SPLITTING CAUSES OF ACTION. A contract for the sale of automobile trucks requiring the purchaser to pay a sum certain in money on a specified date, and also to pay designated accounts or bills then due and owing by the seller, is a divisible one, and judgment in an action to recover the cash payment is not a bar to a subsequent action to recover the amount of the bills and accounts which the purchaser had assumed and agreed to pay as part consideration for the sale.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered March 29, 1920, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Reversed.

Zent & Jesseph, for appellant.

Post, Russell & Higgins, for respondent.

BRIDGES, J.—The chief question involved in this appeal is concerning splitting causes of action. The facts are as follows: On the 14th day of July, 1917, the plaintiff sold to the defendant his interest in certain automobile trucks. The consideration to be paid by the defendant was, first, \$5,500, in money, to be paid on the 18th of July, 1917 (four days after the sale);

¹Reported in 204 Pac. 190.

and, second, the agreement on the part of the defendant to pay certain designated accounts or bills of the plaintiff which were then due and owing. Defendant took possession of the trucks. It refused to make the \$5,500 money payment on the date agreed on, and within a few days thereafter the plaintiff brought suit against it to recover the amount of such cash payment. This suit was later transferred to the United States district court, where, after trial, judgment was rendered for the plaintiff, and that judgment was subsequently paid. This suit was instituted several months after the sale of the trucks, and its purpose was to recover of defendant \$606.14, being the amount of bills and accounts of the plaintiff which the defendant had assumed and agreed to pay as part of the consideration for the sale of the trucks, and which the plaintiff had been required to, and did, pay previously to the bringing of this action. The case was tried to the court without a jury, and findings substantially in accordance with the facts as we have stated them were made by the trial court.

That court further found, and we think correctly, that in the previous suit the plaintiff testified that the consideration for the trucks was the sum of \$5,500, and the assumption of the debts heretofore mentioned. It appears that the plaintiff in that action did not seek to recover, and did not recover, anything other than the \$5,500 which was to be paid in cash, although he knew that the debts which the defendant agreed to pay had not been paid. The court's conclusion was that the case should be dismissed, and judgment was entered in accordance therewith. The plaintiff has appealed from that judgment. There is nothing in the record to show on what ground or for what reason the case was dismissed, but, judging from the briefs, it was because the court considered the contract of sale

Feb. 1922]

Opinion Per BRIDGES, J.

an entire and indivisible one, and that the appellant was bound to make all of his recovery in one action, and that the action in the Federal court was a bar to further suit on the contract. These are the only questions which have been discussed here.

Whether more than one suit can be brought to recover on a single contract depends on whether or not that contract is divisible or indivisible. The courts and authorities can do nothing more than lay down general rules concerning this question, and such rules are seldom determinative of the questions arising under a particular contract. Whether a contract is divisible or indivisible must be determined upon the bare facts of that contract.

The general rule is laid down in 1 C. J. 1108, as follows:

“The application of the rule is restricted entirely to claims and causes of action which are single and indivisible; and it does not prevent the bringing of separate actions upon separate and distinct causes of action, whether such causes arise out of contract or tort, and notwithstanding they are of such a character that they might properly be joined in the same action, this circumstance being immaterial except as authorizing the court in proper cases to order a consolidation of the different actions. Nor is there any splitting of causes where the demand which is the subject of the second action was not due at the time of the first action.”

The rule as given in 24 Am. & Eng. Ency. Law (2d ed.), p. 786, is as follows:

“The rule is well established that a single and indivisible cause of action, whether founded upon a contract or a tort, cannot be divided and made the subject of several suits. All the items which go to make up the demand must be recovered in a single action. If the party entitled thereto brings an action for a part

only of such demand, a judgment therein will forever estop him from bringing suit for the residue.”

In the case of *Harsin v. Oman*, 68 Wash. 281, 123 Pac. 1, this court said:

“While it is admitted there can be but one recovery upon the same cause of action, this does not mean the subject-matter of a cause of action can be litigated but once. It may be litigated as often as an independent cause of action arises which, because of its subsequent creation, could not have been litigated in the former suit, as the right did not then exist.”

We are satisfied that the action in the Federal court was not a bar to this action. The consideration involved in the contract was of two different kinds, one a cash payment, and the other an agreement to pay certain debts of the appellant. The money payment was to be made on a date fixed, but the time for paying the appellant's debts was not fixed, and the respondent had a reasonable time within which to pay them. The action in the Federal court was one for debt, the action here is for the breach of a contract. For these reasons, we are satisfied that the appellant was entitled to maintain this action.

The trial court found appellant was entitled to recover if the suit in the Federal court did not bar him, but it did not find the amount of the debts which the respondent had agreed to pay and had not paid. The testimony, however, shows that the amount the appellant is entitled to recover is the sum of \$595.14. The judgment is reversed, and the cause remanded with directions to the lower court to enter judgment for the appellant, and against the respondent, in the sum of \$595.14.

PARKER, C. J., FULLERTON, and MITCHELL, JJ., concur.

Feb. 1922]

Opinion Per MACKINTOSH, J.

[No. 16867. Department Two. February 14, 1922.]

WEST & WHEELER, *Appellant*, v. E. F. LONGTIN,
Respondent.¹

PARTIES (2)—PLAINTIFFS—REAL PARTY IN INTEREST. Where one contracting with a broker for the purchase of real estate gives a check payable to the broker as earnest money to bind the bargain, and a receipt is issued to the purchaser reciting that, in case of failure to complete the contract, the earnest money shall be forfeited to the broker to the extent of his agreed commission, the broker is entitled to bring suit on the check, as the real party in interest within Rem. Code, § 179.

BILLS AND NOTES (119)—ACTIONS—BURDEN OF PROOF—CONSIDERATION. In an action on a check, there is no burden on plaintiff to show consideration for its issuance, in view of Rem. Code, §§ 3415, 3575, providing that every negotiable instrument shall be deemed to have been issued for a valuable consideration, and that the provisions of the negotiable instruments act governing bills of exchange apply to checks.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 27, 1921, upon granting a nonsuit, dismissing an action on a check. Reversed.

Byers & Byers, for appellant.

James Kiefer, for respondent.

MACKINTOSH, J.—The appellant, acting as agent for James A. Taylor, sold to the respondent certain real estate of the value of \$14,000, upon which the respondent made a payment evidenced by a check made payable to the appellant in the sum of \$1,000. The receipt of this sum was evidenced by an earnest money receipt containing the following provisions:

“But if the title to said described premises shall be found to be good and marketable, free and clear of liens and incumbrances, and purchaser shall fail, re-

¹Reported in 204 Pac. 183.

fuse or neglect to conclude the sale as per the terms of this receipt, then the earnest money herein receipted for shall be forfeited by said purchaser to West and Wheeler, to the extent of their agreed commission and the remainder, if any, to the owner of said premises as liquidated damages for the non-fulfillment of the terms of this memorandum," etc.

The receipt which the appellant held showed on its face that the amount of the commission was five per cent of the purchase price, to wit, \$700. Before the check could be presented to the bank, payment thereon was stopped by the respondent. Appellant then began this action, which was a suit upon the check, and at the close of the appellant's testimony, a motion for nonsuit was granted.

The first point for consideration is whether the action had been brought in the name of the real party in interest, under § 179, Rem. Code (P. C. § 8255), which provides that "every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law." It is the respondent's position that Taylor was the real party in interest, but with this contention we cannot agree. It would seem that when, by the contract between the parties, it was recognized that the appellant, in case of noncompliance by the respondent with his agreement to purchase, was to receive \$700 out of the \$1,000 which had been provided as liquidated damages, West and Wheeler to that extent became the real parties in interest, and that, when a check had been made payable to it, the respondent had further recognized its interest. This court has held in *Harris v. Johnson*, 75 Wash. 291, 134 Pac. 1048, that the payee named in a note which was made payable to him with full knowledge of the transaction was the real party in interest within the mean-

Feb. 1922]

Opinion Per MACKINTOSH, J.

ing of the statutory provision. The general rule is stated in 20 R. C. L. 665, as follows:

“In many jurisdictions, statutes provide, with some few specified exceptions, that any civil actions shall be maintained or brought in the name of the real party in interest. The purpose of such a statute is to relax the strict rules of the common law so as to enable those directly interested in the subject-matter of the litigation to maintain the action, and the statute applies whether the cause of action is at law or in equity. The statute should be so applied as to accomplish its salutary purpose. If a direct and substantial benefit accrues to persons severally, and they are the real parties in interest, they may maintain an action severally. It was not intended to give a new cause of action where none existed, but to simplify matters of pleading and procedure, and to adopt the rule in equity permitting all actions to be brought by the equitable or beneficial owner of the cause of action. This is not to be understood, however, as excluding one holding the legal title or right from suing in his own name. Such person may sue as the real party in interest, if he can legally discharge the debtor and the satisfaction of the judgment rendered will discharge the defendant, although the amount recovered is for the benefit of another; and if the real party in interest is the plaintiff, an objection that the contract sued on was made by him as agent for others will not be considered.”

The next point raised is as to the burden of proof. Under § 3575, Rem. Code (P. C. § 4256), a check is defined as a bill of exchange drawn on a bank, payable on demand, and all provisions of the negotiable instruments act applicable to a bill of exchange are made to apply to a check. Section 3415, Rem. Code (P. C. § 4095), provides: “Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration.” Under these sections, the burden is not upon the plaintiff suing upon a check to show con-

sideration, nor is that rule affected in the instant case by the fact that the respondent, in its complaint, alleged that the check had been given for a consideration.

For the reason first stated, the judgment of the lower court is reversed, and the cause remanded for a new trial.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16689. Department Two. February 14, 1922.]

SAMISH GUN CLUB, *Appellant*, v. SKAGIT COUNTY *et al.*,
Respondents.¹

TAXATION (210)—VALUATION—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. Under Rem. Code, § 9102, providing that all property shall be assessed at its true and fair value in money, an assessment of property on the basis of its use is illegal, though it is proper to take into consideration, in assessing property, any use to which it may be put which gives it added value.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered May 18, 1921, upon findings in favor of the defendants, in an action to enjoin the collection of a tax, tried to the court. Reversed.

J. A. Coleman, R. V. Welts, and Coleman & Gable, for appellant.

W. L. Brickey and W. H. Hodge, for respondents.

MAIN, J.—The purpose of this action was to restrain the collection of a tax upon real property which it is claimed was unreasonable, excessive, and therefore illegal. The trial resulted in findings of fact, conclu-

¹Reported in 204 Pac. 181.

Feb. 1922]

Opinion Per MAIN, J.

sions of law and a judgment sustaining the validity of the tax. From this judgment the plaintiff appeals. The appellant is a corporation and owns about 270 acres of land in Skagit county. All of this land, with the exception possibly of ten or fifteen acres, is what is referred to as mud flats, over which the tide ebbs and flows. The property is used by the appellant as a hunting preserve; it has no substantial value for any other purpose. The tax here involved is for the years 1916, 1917 and 1918. For these years the property was assessed at approximately fifteen times what it had been assessed for the year 1915 and prior years.

In making the assessment of the taxes for the years in controversy the assessor, as we understand his testimony, assessed the use to which the property was being put, claiming that, by reason of the fact that it was an advantageous hunting location and was being used for that purpose, the enhanced value was justified. The assessor testified: "I took into consideration the fact that it was being used for hunting purposes. I did not take into consideration any other value to speak of. The hunting part is what I gave it its value on when I made the assessment." He testified further that, "had the property in this case not been used by the Samish Gun Club or another gun club or any one else for hunting purposes, I do not think I would have assessed it as high." It seems clear from this testimony that the assessor, in levying the tax in controversy, assessed the use to which it was being put. Section 9102, Rem. Code (P. C. § 6939), provides, among other things, that all property shall be assessed at its true and fair value in money. In arriving at this value it is the generally accepted law in this state, as well as in other jurisdictions, that any use to which the property may be put may be taken into considera-

tion, and if it is peculiarly adapted to some particular use, such fact may be taken into consideration.

In applying this rule the assessor had the right to take into consideration the value of the property as a hunting preserve, if such use gave it an added value, but taking into consideration the use, either general or special, to which a property may be put in determining its value is a different thing from assessing the use which is being made of it. The property, if it were not used as a hunting preserve and had a value for that purpose, either general or special, would be of the same value as it would when devoted to that particular use. To illustrate, assume that two persons respectively owned adjoining sections of land, both of which were valuable for the raising of wheat. One of the owners devoted his land to the raising of wheat and it netted him approximately \$10 per acre. The other devoted his to pasturage and received an income of approximately \$1 per acre. The two sections of land would be of the same value, even though one produced a greater income because of the fact that it was devoted to the purpose for which both sections were peculiarly adapted. In making an assessment it would not be proper to assess the use to which the land upon which wheat was being raised was put, but both sections of land would have the same value, even though one was producing a greater income than the other, they both being adapted to the use to which the one producing the greater income was put. In making the assessment upon the property in question upon the use to which it was being put, the assessor proceeded upon a fundamentally wrong basis. It is well settled in this state, as said in *Weyerhaeuser Timber Co. v. Pierce County*, 97 Wash. 534, 167 Pac. 35, that where the assessing officer in making an assessment "pro-

Feb. 1922]

Opinion Per MAIN, J.

ceeded upon a fundamentally wrong basis or theory in making the assessment, the courts will grant relief against an overvaluation of real property, and this regardless of the action of the board of equalization in the premises.”

The appellant, before bringing this action, tendered to the county treasurer the full amount of the taxes which it claimed was due upon the property, and its tender was based upon the value of the property as it was assessed for the year 1915. In the year 1918, there had been a horizontal raise on the assessed value of all property in Skagit county, and the assessed value of the property of the appellants was thus increased thirty per cent thereby. In making the tender, this thirty per cent increase was not taken into consideration. Upon the record in this case, since the assessments for the years 1916, 1917 and 1918 were upon a fundamentally wrong basis, the appellants' property should not only answer for the amount tendered, but the thirty per cent increase.

The judgment will be reversed, and the cause remanded with direction to enter a judgment in accordance with the views herein expressed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16939. Department Two. February 14, 1922.]

W. B. WHITE, *Appellant*, v. T. W. LITTLE COMPANY.
*et al., Respondents.*¹

EVIDENCE (149)—PAROL EVIDENCE TO VARY WRITING—SALE OF CHATTELS. Where orders for trucks and trailers provided that, at time of delivery, conditional sales contracts were to be executed and that no verbal agreement would be recognized, it must be presumed that the conditional sales contracts entered into contained all the elements of the contracts, and they could not be varied by alleged oral agreements as to equipment and time and place of delivery.

SALES (78) — PERFORMANCE — DELAY IN DELIVERY — WAIVER — EFFECT OF ACCEPTANCE. A purchaser's acceptance of personal property in fulfillment of an executory contract of sale is a waiver of objection that it was not delivered at the time agreed, unless his acceptance was qualified by a reservation of the right to claim damages caused by the delay.

SAME (78). Where, after placing an order for trucks and trailers at a designated price, the purchaser afterwards executes conditional sale contracts for an increased price, under threats of the seller not to make delivery otherwise, and necessities of the purchaser's business forced him to agree to pay in order to get the trucks, he cannot recover the excess price in an action for damages, in case no protest was made at the time, and no payments covering the excess have been made, his proper remedy being one for reformation of the contract.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 12, 1921, upon sustaining demurrers to the complaint, dismissing an action on contract. Affirmed.

Cooley, Horan & Mulvihill, for appellant.

Wm. H. Pratt, for respondents.

HOLCOMB, J.—This action arose from the execution of two orders for the sale of two trucks and two trailers. A complaint, omitting the formal parts, was filed, in words as follows:

“That on the 22d day of June, 1920, the plaintiff

¹Reported in 204 Pac. 186.

Feb. 1922]

Opinion Per HOLCOMB, J.

made the following contract in writing for a truck and trailer:

“ ‘T. W. LITTLE Co.,
 Everett, Wash., U. S. A., 6/22, '20.
 Order No.....
 Invoice No.....

Please enter my order for the following:

Quantity	Model	Description	Price
One	R	Signal Trucks	\$5,800.00
One	7½ ton	Trailer	1,750.00

If other trailer selected price to be arranged.

“ ‘To be delivered on arrival, for which I agree to pay the sum of Seven Thousand Five Hundred Fifty and no/100 dollars (\$7,550) F. O. B. Everett; Terms balance at 8 per cent, 12 months.

“ ‘I herewith hand you advance payment allowance on second-hand model M. Signal, Motor No. 4366, Chasis No. 2908, trailer of three thousand five hundred dollars (\$3,500) as guarantee of good faith, which amount shall be deducted from the above price at final settlement.

Sold by C. P. Abbott.

Accepted: T. W. Little Co.

“ ‘By T. W. Little. (Signed) W. B. White,
 Address: 3532 Rucker Ave.

“ ‘At the time of delivery a conditional sales contract will be executed in the regular form of..... reserving the title until full payment.

“ ‘No verbal agreement recognized.’

“ ‘That before the defendant Little Company acted on said order the plaintiff selected another type of trailer at an agreed purchase price of Eighteen Hundred Dollars (\$1,800), making the total purchase price of truck and trailer in said order seventy-six hundred dollars (\$7,600).

“ ‘That there was to be shipped with said order a kit of tools to be used with said truck and trailer of the value of seventy-five dollars (\$75).

“ ‘That the plaintiff was informed by the defendant Little Company, through its agents, the said truck was then manufactured and ready for shipment at the factory of the manufacturer at Detroit, Michigan, and

that they would wire the order and said truck would arrive at Everett not later than ten days from the date of said order.

“That said truck was not manufactured at the time of said order and had to be manufactured before said order could be filled, and said truck was not shipped to Everett at all, but was shipped to Tacoma, Washington, and arrived at Tacoma, on the 15th day of September, 1920, and the defendant, T. W. Little Company, did not deliver possession of said truck to this plaintiff until the 22nd day of September, 1920.

“That by the delay in the shipping and delay in the obtaining possession of said truck, this plaintiff was damaged in the sum of forty (\$40) dollars per day for a period of sixty-seven days.

“For a second cause of action the plaintiffs allege:

“Plaintiffs reallege paragraphs I, II, III and IV and make them a part of their second cause of action, and further allege:

“That he was compelled to send to Renton, Washington, to get possession of said truck and trailer; that the defendant T. W. Little Company, refused to deliver the same at Everett, Washington.

“That plaintiff was forced to pay the sum of fifty dollars (\$50) to bring said truck and trailer from Renton, Washington, to Everett, Washington, and said sum was a reasonable sum for said service, and plaintiff was damaged in said sum.

“As a fourth cause of action plaintiff alleges paragraphs I, II, III and IV, and makes them a part of the fourth cause of action, and further alleges:

“That said truck arrived at Tacoma, Washington, on September 15th, 1920; that upon the arrival of said truck this plaintiff demanded possession of the same; that the defendant, T. W. Little Company, refused to permit plaintiff possession: that defendant, T. W. Little Company, was insolvent and refused, neglected and was unable to pay to the transportation company the freight thereon and said transportation company refused to permit the plaintiff to inspect said truck and said defendant, T. W. Little Company, refused to get possession from said transportation company and

Feb. 1922]

Opinion Per HOLCOMB, J.

deliver the same to plaintiff unless plaintiff would execute the contract marked Exhibit 'A', and attached hereto and made a part of this complaint.

"That plaintiff was unable to purchase other trucks; that plaintiff had a large amount of lumber that he had to remove; that he had a great number of men employed who were forced to remain idle waiting for said trucks; that there were no other trucks in the market procurable by the plaintiff at said time similar to the trucks ordered herein, and if plaintiff did not sign the contract, Exhibit 'A', he would lose a larger sum of money which he had invested in timber, and lose the sum of money which he had advanced to the defendant herein and agreed to pay under said contract, and that he would have no recourse for said loss; that the said defendant, T. W. Little Company, threatened to leave said car with said transportation company or divert it to other points and as a result of said acts on the part of said defendant, T. W. Little Company, acting through its agent T. W. Little, the said plaintiff signed and executed Exhibit 'A'; that under said Exhibit 'A' he was required to pay for said truck and trailer the sum of seventy-nine hundred and ninety dollars and ten cents (\$7,990.10), whereas said defendant had agreed to sell said car as in the order above set forth for the sum of seventy-six hundred dollars (\$7,600); that said Exhibit 'A' was executed by said plaintiff under duress as aforesaid.

"For a fifth cause of action against the defendant, plaintiff alleges:

"That on the 18th day of July, 1920, the plaintiff and the defendant entered into the following contract of sale:

" 'T. W. Little Co.

Everett, Wash., U. S. A. 7/18, '20.

Please enter our order for the following:

Order No.....

Invoice No.....

<i>Quantity</i>	<i>Make</i>	<i>Model</i>	<i>Description</i>	<i>Price</i>
1	Signal	M. or R.	3½ or 5 Ton Signal Truck and Trailer'	

“ ‘This is a credit Memo to apply on either
3½ or 5 ton Signal.

To be delivered as soon as possible after ordered shipped. For which agrees to pay the sum of market price on either truck at time of delivery (\$.....) F. O. B.....; terms to be arranged same as other deal.

.....herewith hand you advance payment of allowance for one used 3½ ton Signal truck to be Dollars (\$3,500.00) as guarantee of good faith, which amount shall be deducted from the above price at final settlement.

“ ‘Sold by.....

“ ‘Accepted: T. W. Little Co.,

“ ‘By T. W. Little, President.

“ ‘(Signed) W. B. White,

“ ‘Address: 3532 Rucker Ave.,

“ ‘At the time of delivery a conditional sales contract will be executed in the regular form of reserving title until full payment.

“ ‘No verbal agreement recognized.’

“ ‘That said truck and trailer was to cost seventy-six hundred dollars (\$7,600) furnished complete with kit of tools.

“ ‘That defendant failed, neglected and refused to deliver any tools with said truck and plaintiff was damaged in the sum of seventy-five dollars (\$75).

“ ‘As a sixth cause of action against the defendant, T. W. Little Company, this plaintiff realleges paragraphs I and II of the fifth cause of action, and further alleges:

“ ‘That plaintiff was compelled to send to Renton, Washington, to get possession of said truck and trailer; that the defendant, T. W. Little Company, refused to deliver the same at Everett, Washington.

“ ‘That plaintiff was forced to pay the sum of fifty dollars (\$50) to bring said truck and trailer from Renton, Washington, to Everett, Washington, and said sum was a reasonable sum for said services and plaintiff was damaged said sum.

“ ‘As a seventh cause of action this plaintiff alleges:

“ ‘That said truck arrived at Tacoma, Washington,

Feb. 1922]

Opinion Per HOLCOMB, J.

on September 15th, 1920; that upon the arrival of said truck this plaintiff demanded possession of the same that the defendant, T. W. Little Company, refused to permit plaintiff possession; that defendant, T. W. Little Company, was insolvent and refused, neglected and was unable to pay to the transportation company the freight thereon and said transportation company refused to permit the plaintiff to inspect said truck and said defendant, T. W. Little Company, refused to get possession from said transportation company and deliver the same to plaintiff unless plaintiff would execute the contract marked Exhibit 'B', and attached hereto and made a part of this complaint.

"That plaintiff was unable to purchase other trucks; that plaintiff had a large amount of lumber that he had to remove; that he had a great number of men employed who were forced to remain idle waiting for said trucks; that there were no other trucks in the market procurable by the plaintiff at said time similar to the trucks ordered herein, and if plaintiff did not sign the contract, Exhibit 'B', he would lose a large sum of money which he had invested in timber, and lose the sum of money which he had advanced to the defendant herein and agreed to pay under said contract, and that he would have no recourse for said loss; that the said defendant, T. W. Little Company, threatened to leave said car with said transportation company or divert it to another point and as a result of said acts on the part of said defendant, T. W. Little Company, acting through its agent, T. W. Little, the said plaintiff signed and executed Exhibit 'B'; that under said Exhibit 'B' he was required to pay for said truck and trailer the sum of eighty-one hundred eighty-three dollars and four cents (\$8,183.04) where said defendant had agreed to sell said car as in the order above set forth for the sum of seventy-six hundred dollars (\$7,600); that said contract, Exhibit 'B', was executed by said plaintiff under duress as aforesaid.

"That the defendant, T. W. Little Company, has assigned all its right, title and interest in said contract to H. K. Todd, defendant herein as security for a loan,

the amount of said loan being unknown to this plaintiff.”

Upon this complaint the plaintiff prayed for judgment on the first cause of action for \$2,860; on the second cause of action for \$75; on the third cause of action, \$50; on the fourth cause of action, \$390; on the fifth cause of action, \$75; on the sixth cause of action, \$50; on the seventh cause of action, \$583; that these contracts A and B be reformed by the court to comply with the orders set forth in said complaint, or the same be cancelled for duress imposed upon the plaintiff, and that if the same are not cancelled, that the amount of the judgment herein prayed for be ordered offset against the plaintiff to be made under said contracts A and B, and the plaintiff have such other relief as may seem justifiable from the facts or equities in the matter.

Exhibit “A” is a conditional sale contract dated September 16, 1920, by which the respondent T. W. Little Company agrees to sell to appellant, as equipped, one Model “R” Signal Truck and one 8½-ton Pacific Car and Foundry Company trailer, for the sum of \$7,990.10, upon installments, as follows: \$3,500 to be paid on the 16th day of September, 1920, and \$374 on the 16th day of each month thereafter until the full sum is paid, the title to remain in the vendor, and if any default is made in any payment, or if the vendor at any time deems itself insecure, it may take possession of the property, retain all payments made as liquidated damages, or may sell the property under a mortgage foreclosure and apply the proceeds to any deficiency, and have a deficiency judgment for the balance with allowances for costs, etc., which contract is signed by vendor and vendee.

Exhibit B is identical with exhibit A, except that the

Feb. 1922]

Opinion Per HOLCOMB, J.

total amount to be paid under exhibit B is \$8,183.04, and installments of \$390 are to be paid on the same day, and the last installment is \$393.04, and the number of the truck and trailer is different.

To this complaint each of the defendants filed a general demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action. The lower court sustained these demurrers, and the plaintiff refusing to further plead, the court signed and entered a judgment dismissing the action, and from this judgment the plaintiff appeals to this court.

There is no doubt that as to the first, second, third, fifth and sixth causes of action, as set forth in the complaint of appellant, the demurrers were properly sustained.

The first cause of action was for damages at the rate of \$40 per day for 67 days' delay in the delivery of one of the trucks. It is contended that it was orally agreed between the parties that the truck would be delivered in ten days, but was not delivered until the time alleged. It is not alleged, however, that there was any protest made when the truck did arrive, and it is shown that appellant executed his written promise to pay for the truck when it arrived and when he received it, apparently without complaint or protest.

The second cause of action is for a kit of tools alleged to have been agreed to be a part of the equipment of the truck, although the written agreement signed by appellant states that he accepts the truck as equipped.

The third cause of action alleged is for \$50 because the truck was not delivered at the place where appellant contends it should have been delivered, but it is shown that he received it at the other place, and this would seem to constitute a waiver of the place of delivery.

The fifth cause of action is the same as the second, except that it was for another kit of tools on another truck, but the conditions were the same.

The sixth cause of action is the same as the third, except that it applies to another truck; but the conditions of receiving are the same. The trucks alleged in both causes of action were accepted and contracted for in writing.

The orders contained the clause: "No verbal agreement recognized." When the trucks arrived, the contracts were reduced to writing in the form of conditional sale contracts, which are presumed to contain all the elements of their contracts. Under the allegations as to these causes of action it is plain that they are nothing more than efforts to add oral agreements of the parties and thereby vary the contracts, which cannot be done. *Buffalo Pitts Co v. Shriner*, 41 Wash. 146, 82 Pac. 1016; *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515; *Western Farquhar Machinery Co. v. Pierce*, 108 Wash. 621, 185 Pac. 570.

As to the failure to deliver the trucks on time, where in each case it was one entire delivery, a vendee's acceptance of the property in fulfillment of an executory contract of sale is a waiver of objection that it was not delivered at the time agreed, unless his acceptance was qualified by a reservation of the right to claim damages caused by the delay. *Minneapolis Threshing Machine Co. v. Hutchins*, 65 Minn. 89, 67 N. W. 807; 35 Cyc. 175.

The fourth and seventh causes of action are for damages alleged because appellant was compelled, under duress, to sign the contracts for the purchase of the trucks for a greater amount than the purchase price of the trucks as named in the original orders. These causes of action come near stating causes of action for

Feb. 1922]

Opinion Per HOLCOMB, J.

some relief, but fall short, as we shall presently show. It is to be noted that they contain no allegations that the contracts were signed for the additional amounts over the original orders, under protest, or that the additional amounts have been paid. It would seem that the utmost that appellant could demand in the situation shown, if the contracts varying from the original bargains had been made *under protest*, would be the reformation of the contracts, if it be conceded that his allegations of duress are sufficient. Without elaborate discussion upon the subject of duress, we have held that the recovery of excessive amounts of money paid under duress, or restraint of goods, by a demandant, will require the return of the money so paid, if paid under protest. *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 Pac. 640.

We are of the opinion that the situation shown of undue advantage and oppression, and the threats alleged to have been made by the vendor of the trucks to appellant when the trucks arrived were oppressive and coercive; but, in the absence of complaint or protest made at the time, we cannot hold the payments contracted to be made but not made to have been involuntary. The distinction between voluntary and involuntary payments has been very clearly pointed out in many cases. *Tripler v. New York*, 125 N. Y. 617, 26 N. E. 721; *Scholey v. Mumford*, 60 N. Y. 498; *Bates v. New York Insurance Co.*, 3 Johns. Cas. (N. Y.) 238; *Buckley v. New York*, 30 App. Div. 463, 52 N. Y. Supp. 452; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Radich v. Hutchins*, 95 U. S. 210.

In the last cited case, Mr. Justice Field stated:

“To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary,
 . . . there must be some actual or threatened

exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.”

In *Bates v. New York Insurance Co.*, *supra*, it was stated:

“The equitable extension of this kind of action has of late been so liberal, that it will lie to recover money obtained from anyone, by extortion, imposition, oppression, or taking an undue advantage of his situation. In the present case, there was, at least, an undue advantage taken of the plaintiff’s situation. . . . The money being inequitably demanded of him, he must be presumed to have paid it, relying on his legal remedy to recover it back.”

And in *Buckley v. New York*, *supra*, it was said:

“There is no iron-clad rule which confines an involuntary payment to cases of duress of person or restraint of goods. Money compulsorily paid to prevent an injury to one’s property rights comes within the same principle.”

Under these authorities, had appellant paid the sums alleged in his fourth and seventh causes of action in excess of the sums agreed upon to be paid for the trucks, and under the threats, undue advantages and oppression alleged, on the part of the vendor, under protest at the time, we should say he would be entitled to recover such excess sums so exacted; but, so far as the pleadings show, there was no complaint or protest made at the time, and writings only were executed for the future payments for the trucks in installments. The most that could be said would be that, under such circumstances, had the payments been made under protest and involuntarily, and under such restraint and duress, he would have been entitled to the reformation of the agreements. He has not alleged facts sufficient

Feb. 1922]

Opinion Per TOLMAN, J.

to so entitle him in this action as to these causes of action.

The judgment is therefore affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16787. Department One. February 14, 1922.]

GENERAL MOTORS ACCEPTANCE CORPORATION, *Appellant*,
v. ARTHAUD LAND COMPANY, *Respondent*.¹

SALES (179-1)—CONDITIONAL SALES—ASSIGNMENT OF CONTRACT—EFFECT—RIGHTS OF SUBSEQUENT MORTGAGEE—ESTOPPEL TO ASSERT TITLE. Where an automobile dealer sells a car under a conditional sale contract, taking a promissory note for deferred installments of the price, which together with the contract is assigned to another, and, the dealer, as agent of the assignee, subsequently repossesses himself of the car for nonpayment of the balance due and places it among his stock, and mortgages it to a third party, the assignee of the contract cannot replevin the car from the mortgagee; since he brings himself within the rule that where one of two equally innocent persons must suffer, that one whose act or neglect makes a fraudulent act possible must bear the loss occasioned thereby.

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered May 25, 1921, in favor of the defendant, dismissing an action of replevin. Affirmed.

J. E. Stewart, for appellant.

F. L. Morgan, for respondent.

TOLMAN, J.—Appellant, as plaintiff below, brought this action to recover possession of a certain automobile, claiming ownership thereof under a conditional sale contract assigned to it by the vendor therein

¹Reported in 204 Pac. 194.

named. From a judgment denying it the relief sought, this appeal is prosecuted.

It appears that, on November 18, 1919, one Louis J. Mason, an automobile dealer of Hoquiam, Washington, entered into a conditional sale contract in writing with one Jack Allen, wherein and whereby he agreed to sell the automobile now in question to Allen, upon the terms and conditions therein stated, the title to be retained by Mason until the conditions were fully performed. At the same time and as a part of the same transaction, Allen executed and delivered to Mason a promissory note evidencing the deferred payments referred to in the conditional bill of sale, which note provides, "This note covers deferred installments upon a conditional sale contract made this day between the payee and the maker hereof," and the conditional sale contract also sets forth that the deferred payments are evidenced by a promissory note designated a negotiable instrument, and further provides that neither the delivery of the note by the purchaser or the negotiation or discounting of it by the seller shall be deemed a payment of the purchase price, and "that title to the said property shall not pass to the purchaser until such negotiable instrument and any interest due are fully paid in cash, with or without legal process, and this to include any judgment secured." Other features of this conditional sale contract will be noticed as we proceed.

At the time of executing the contract, it was signed by both the seller and purchaser in triplicate, that is, by the use of carbon sheets three duplicates were filled out and signed by the same impression of pen or pencil. The first of these duplicates is called the "white sheet," the paper being white in color, and it is exactly the same in all its details as the other two sheets ex-

Feb. 1922]

Opinion Per TOLMAN, J.

cept for the color, certain marginal notes which we regard as immaterial, and a printed form of assignment on the back, which the other two sheets do not possess. Immediately following the execution of this contract in triplicate as stated, Louis J. Mason dated and signed the assignment on the first or white sheet, which is as follows:

“For value received the undersigned does hereby sell, assign and transfer to General Motors Acceptance Corporation, San Francisco, California, his, its or their right, title and interest in and to the within contract, and the property covered thereby, and authorizes said General Motors Acceptance Corporation to do every act and thing necessary to collect and discharge the same.

“In Witness Whereof, said undersigned has hereunto subscribed his, its or their name the 18 day of Nov., 1919.

“(Signed) Louis J. Mason.”

This white sheet, so endorsed, was by Mason attached to a draft for the unpaid portion of the purchase price of the automobile, forwarded by him to a bank in San Francisco, through which he received from appellant the money called for by the draft, and the contract bearing the assignment passed into, and has ever since remained in the possession of appellant. On November 20, 1919, or two days after the date of the contract, the second or so-called “yellow sheet” of the triplicate contract was duly filed for record in the office of the auditor of Grays Harbor county. This sheet so filed contained no reference whatever to the General Motors Acceptance Corporation or to the assignment, and there was nothing thereon or subsequently filed in the office of the auditor of Grays Harbor county in any way indicating the assignment of the contract by Mason to the appellant. The promissory note executed by Allen as a part of the transaction was also endorsed

by Mason and delivered to appellant, probably being attached to the draft and delivered at the same time the contract was delivered. The installment note given with the contract bears the following endorsements subsequent to Mason's endorsement:

"Pay to the order of Union Trust Company, San Francisco, Sub-trustee under trust deed dated May 8, 1919.

"General Motors Acceptance Corporation,
"By C. R. Warren, Secretary."

and also:

"Without recourse pay to the order of General Motors Acceptance Corporation.

"Union Trust Company of San Francisco,
"By L. J. Fay, Cashier."

and these endorsements are thus explained by one of appellant's officers who testified in the case:

"Q. I call your attention (I want to call the court's attention at the same time) to an endorsement on the back of this note 'pay to the order of the Union Trust Company of San Francisco.' Apparently that note was assigned to the Union Trust Company? A. No. We put it in trust in San Francisco, that is all. Q. And later apparently it was reassigned without recourse to the General Motors Acceptance Corporation by the Union Trust Company? A. Yes, because we paid it in full to the Union Trust Company in order to get possession of it."

It appears that Allen, the conditional vendee, was a salesman employed by Mason, and though there is some ground to suspect that, as between them, the sale was a colorable one only, yet both testify that, upon the making of the contract, Allen was given possession of the automobile, used it as he saw fit, but except as he might be out of town upon occasions with the car, he kept it stored while not in use in Mason's garage. Allen testified that he made none of the deferred pay-

ments whatever, and after keeping the car for a time and driving it some two thousand miles, partly for his own pleasure and partly for demonstration purposes in connection with his duties as salesman for Mason, he surrendered the car to Mason. The exact date of such surrender is not fixed, and since apparently appellant had no notice thereof it is not now very material. After Mason had repossessed the car from Allen, and before appellant was advised of that fact, Mason on May 17, 1920, borrowed from respondent the sum of \$2,000, gave a demand note therefor with interest at the rate of eight per cent, and to secure the payment of the note made and duly executed a chattel mortgage to respondent covering four certain automobiles therein described, one of which is the car in question, which chattel mortgage was, on the succeeding day, duly filed for record. It seems to be admitted that at the time this mortgage was made, the car in question was in Mason's garage, with every indication that it was a part of his stock in trade; that it was there examined by respondent's agents at the time the loan was made and the chattel mortgage accepted, and that respondent had no knowledge of any fact sufficient to put it upon notice that Mason was not the absolute owner thereof. In fact, it is admitted that neither of the parties to this action had any knowledge or notice of the rights of the other until after those rights had become fixed. In due course, by reason of the financial difficulties of Mason, respondent took possession of the car by virtue of its chattel mortgage, and thereafter appellant, learning of that fact, made demand for the surrender of the car to it, which being refused, this action was instituted.

Appellant contends that, by reason of the assignment of the contract, it became the owner of the car, subject only to the vendee's rights; *Barbour v. Hodge*,

99 Wash. 578, 170 Pac. 115; *State Bank of Black Diamond v. Johnson*, 104 Wash. 550, 177 Pac. 340; and by reason of the terms of the contract permitting the negotiation of the note without thereby affecting the reserved title, the claimed non-negotiability of the note because of the recitals therein referring to the contract, and, in any event, because of the fact, as claimed, that the note was not negotiated, but simply endorsed to a trustee, who cannot be presumed to be a purchaser before maturity for value and without notice, the facts do not warrant the application of the rule laid down in *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71.

Assuming, without deciding, that, for present purposes, these points are well taken, what then follows? Appellant argues that the case of *State Bank of Black Diamond v. Johnson*, *supra*, is controlling; that, under the authority of that case, Mason, having no title, could convey nothing, and as against appellant the chattel mortgage was a nullity, and challenges us to point out by what act of omission or commission the title which appellant acquired by reason of the assignment to it of the contract has been lost. The answer, we think, is both simple and logical. Assuming the title to be vested in appellant by reason of the assignment, which in terms conveys both the contract and the property therein described, it must be admitted that, though in the *State Bank of Black Diamond* case such assignment was filed for record, and noted in the index kept by the county auditor, we there, in effect, held that such filing was not constructive notice because not required by the conditional sales statute. Rem. Code, §§ 3670, 3671 (P. C. §§ 9767, 9768). Nor can we here hold that the assignment should have been recorded as a bill of sale (though it is such in effect) under Rem. Code, § 5291 (P. C. § 7747), because the property was not left

Feb. 1922]

Opinion Per TOLMAN, J.

in the possession of the vendor, Mason, but passed into the possession of the vendee, Allen, notwithstanding the fact that he kept it, presumably for his own convenience, in Mason's garage. How then did appellant lose its title or become estopped from asserting title as against respondent? As assignee of the conditional sale contract, appellant became bound by all of its terms, and, among other things, the contract provides:

“It is further agreed that if said negotiable instrument, or any part thereof is not paid at the time and place therein specified, . . . the balance unpaid on said negotiable instrument shall become due and payable immediately at the election of the holder of said negotiable instrument, and in that event the seller may take immediate possession of the said property, for the benefit of the holder of the said negotiable instrument. . . . Purchaser further agrees that seller may sell said property so taken, at public or private sale, with or without notice to purchaser, and with or without having said property at the place of sale, upon such terms and in such manner as the seller may determine; and seller or the holder of said negotiable instrument shall have the right, at any public sale to purchase the said property. The proceeds of any public or private sale, after deducting therefrom the expenses incurred by seller in protecting his rights, shall be applied to the amount due holder of said negotiable instrument under this contract, and any surplus remaining shall be paid over to purchaser.”

These provisions of the contract clearly recognize that, at the time of the default, the seller might not be the holder or owner of the negotiable instrument, and in plain terms the possibility that the seller and the holder of the negotiable instrument may be separate and distinct persons is clearly recognized. And notwithstanding that the seller may have parted with all financial interest in the contract by reason of the transfer of the negotiable instrument, he is, by the provi-

sion quoted, given the right upon default to take immediate possession of the property for the benefit of the holder of the negotiable instrument. Or, if the quoted provisions of the contract be construed to mean that the seller may not thus take possession without the holder of the negotiable instrument having first elected to declare the whole sum due, then there is nothing in the contract to show how that election shall be evidenced, or justify the vendee in demanding any such evidence, and upon default occurring and the demand for possession being made by the seller, the vendee and all others are justified in assuming that the seller is duly authorized to take such possession. In either event, this is exactly what was done in this case. Allen, the purchaser, made default. Mason, the seller, repossessed himself of the automobile, and under the terms of the contract he thus took possession for the benefit of the appellant, who was then the holder of the negotiable instrument. Appellant, as the assignee of the contract, with knowledge of its provisions, was bound to know of the taking of such possession by the seller, Mason, as its agent, at its peril, and there is ample evidence in the record to put it upon notice as to those facts. It is undisputed that Allen, the purchaser, made none of the deferred payments whatever. Hence if any payments were made to appellant they were made by Mason, and that fact is admitted upon the witness stand by Mr. Storey, the branch manager of appellant's Portland office, and confirmed by letter written from its California office dated as late as March 18, 1921, addressed to Mason, which says:

“Your attention is invited to the account of Jack Allen. This car is in your possession and as the October and November installments are past due we must

Feb. 1922]

Opinion Per TOLMAN, J.

ask that you mail your check in the amount of \$245.00 to bring the account to a close.”

Thus indicating, at least, that appellant at all times looked to Mason to make the collections from Allen, as its agent, and remit them. While it is denied that appellant knew that Mason had repossessed himself of the car prior to the time when the mortgage was given to respondent, yet, in view of the terms of the contract, it was its duty at all times to know the exact conditions relating to this car. It had appointed Mason as its agent by the terms of the contract, and by its course of dealing, and when it permitted its agent, acting with apparent authority under the terms of the contract, to retake possession of the car, place it in stock in his garage, with every indicia of ownership in him, it thereby put it within his power to deal with it as his own, to sell it and pass title to an innocent purchaser, or to mortgage it, as he did. Indeed, as we read the contract, he was expressly authorized to sell it, and under these circumstances appellant is estopped from asserting its title as against respondent's mortgage, made in good faith in reliance upon Mason's possession and apparent title. It is a familiar rule that possession and apparent right of possession is evidence of title, and equally well settled that a case such as this where one of two equally innocent persons must suffer, that one whose act or neglect made the fraudulent act possible must bear the loss occasioned thereby.

We conclude that, under the terms of the contract, it was appellant's duty to keep itself advised as to whether or not the vendee was performing the conditions of the contract; that it was bound to know of his default and of the taking of possession of the automobile by Mason under the terms of the contract, and should forthwith have required the car to be sold as in the contract provided, possessed itself of the same to

the exclusion of Mason, or taken some position which would have given unequivocal notice to those dealing with Mason as to what its rights were in the premises.

The judgment of the trial court was right and is affirmed.

PARKER, C. J., BRIDGES, FULLERTON, and MITCHELL, JJ., concur.

[No. 16896. Department Two. February 16, 1922.]

FRYE & COMPANY, *Respondent*, v. MERCHANTS' TRANSPORTATION COMPANY, *Appellant*.¹

CORPORATIONS (193)—ACTIONS — CAPACITY TO SUE — CONDITIONS PRECEDENT—ISSUES—FAILURE OF PROOF. Where an issue has been raised by the pleadings as to the capacity of a corporation to sue, a finding by the court of such capacity is unwarranted in the absence of proof addressed to that issue.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered June 25, 1921, upon findings in favor of the plaintiff, in an action on contract tried to the court. Reversed.

Byers & Byers, for appellant.

Donworth, Todd & Higgins, for respondent.

HOLCOMB, J.—Respondent alleged, appellant denied on information and belief, but the court found, that respondent is a corporation of the state of Nevada, with its principal place of business in Seattle, King county, Washington, and had paid its annual license fee due the state of Washington, at the time of the pleading.

Appellant moved a nonsuit at the close of plaintiff's case upon the ground of utter failure of proof, which was denied by the court. Appellant excepted to this

¹Reported in 204 Pac. 184.

Feb. 1922]

Opinion Per HOLCOMB, J.

finding because there was no proof of the facts, and bases error thereon. There is no proof or admission in the record of those necessary and material allegations of fact.

A number of other errors are urged, but this one is sufficient. In all other respects we are disposed to affirm the judgment against appellant, deeming the other errors urged to be untenable. There is nothing serious involved but questions of fact.

We long ago held, in *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926, that the legal capacity of the plaintiff may be raised under the form of general denial, and that, under such denial, plaintiff was put to its proof as to every allegation material to its cause of action. See, also, *Thompson-Spencer Co. v. Thompson*, 61 Wash. 547, 112 Pac. 655, and *Washington Printing Co. v. Osner*, 99 Wash. 537, 169 Pac. 988.

In the last two cases, no issue had been raised as to the corporate capacity of plaintiff, by the pleadings. In this case, the issue having been raised, and there being a total failure of proof as to the corporate capacity of respondent, it follows that there was a complete failure of proof upon which to base such finding necessary to respondent's recovery.

The judgment is reversed and a new trial ordered.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16973. *En Banc*. February 16, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Morris Buttnick, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Calvin S. Hall, Judge*, Respondent.¹

HUSBAND AND WIFE (108)—SEPARATE MAINTENANCE—TEMPORARY ALLOWANCE AND SUIT MONEY—EFFECT OF APPEAL. Although a judgment for separate maintenance of a wife and children has been superseded pending appeal, the superior court still retains jurisdiction after such judgment to compel the husband to pay for her separate maintenance during appeal, notwithstanding the supersedeas, and to order the payment by the husband of suit money for the preparation of her case on appeal.

SAME (108)—SEPARATE MAINTENANCE—SUIT MONEY—DENIAL OF MARRIAGE—APPEAL—PRESUMPTIONS. The denial of the existence of a legal marriage relation between parties will not defeat the right of the alleged wife to an allowance for maintenance and suit money pending an appeal from a judgment awarding her separate maintenance, where the trial court has found that there was a valid marriage between the parties.

Application filed in the supreme court December 10, 1921, for a writ of prohibition to prohibit the superior court for King county, Hall, J., from further proceeding in a cause. Denied.

Arthur C. Bannon and Peters & Powell, for relator.

Greene & Henry and James E. McGrew, for respondent.

HOLCOMB, J.—This is an original action for a writ of prohibition, directed to the respondent, to prohibit it from further proceeding in the matter of granting an award for temporary maintenance and for suit money pending the appeal from a decree in favor of the alleged wife in an action for separate maintenance.

The only question to be determined is whether the

¹Reported in 204 Pac. 177.

Feb. 1922]

Opinion Per HOLCOMB, J.

trial judge who heard and entered the judgment in the case below has the power, after an appeal has been perfected, supersedeas bond given and the judgment superseded, to entertain a motion for the allowance to plaintiff of support for herself and minor child during the pendency of the appeal, and for sufficient funds to enable her to properly present her case before this court.

The trial judge, on August 22, 1921, entered a judgment against the relator, requiring him to pay Celia Buttnick, the plaintiff in the action below, the sum of \$200 per month for her separate maintenance, such payments to begin with the 15th day of July, 1921, and to continue the payments on the first business day of each month thereafter. Relator appealed from that judgment and gave a bond on appeal and a supersedeas bond, and upon the appeal being thus taken, Celia Buttnick made application for an order compelling the relator to pay her for her separate maintenance \$200 per month pending the appeal, notwithstanding the supersedeas, and also \$500 for the preparation of her case on appeal.

Relator strenuously insists that the superior court has no jurisdiction to compel the relator, pending the appeal, to pay the precise amounts required by the superseded judgment; and that the superior court has no jurisdiction, notwithstanding the supersedeas, to compel the relator to pay suit money.

We have held in a number of cases that an action by a wife for separate maintenance against the husband is upon the same footing as an application for divorce and temporary and permanent alimony and suit money. *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812; *State ex rel. Young v. Superior Court*, 85 Wash. 72, 147 Pac. 436.

And we have also held that this court has no original jurisdiction to grant suit money and temporary alimony pending an appeal in such cases, and that the superior court has such jurisdiction. *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 636; *Lewis v. Lewis*, 83 Wash. 671, 145 Pac. 980.

It is urged by relator, however, that, although the superior court has jurisdiction in both actions for divorce and actions for separate maintenance of the wife to grant temporary alimony or maintenance and suit money, it has no such jurisdiction in a suit the sole object of which is separate maintenance and suit money, after an appeal has been taken from the judgment in her favor made in the court below.

In *Lewis v. Lewis*, 83 Wash. 671, 145 Pac. 980, we held that, as to divorce actions, where such an award was made to the wife after an appeal had been perfected by the husband, the superior court had such jurisdiction. There it was observed:

“The order complained of here was entered after the appeal had been perfected. The allowance or disallowance of suit money, attorney’s fees or alimony pending the appeal is not a part of the original judgment appealed from. Neither is it a matter embraced therein. The wife could not, in fact, make the application until after the appeal had been taken, because she could not have known that the husband intended to appeal from the judgment dismissing the action until the notice of appeal was served.”

Those observations are pertinent here. Relator argues:

“In deciding this question the court need go no further than to consider the effect of the supersedeas. The effect of a supersedeas is to prevent the execution of the judgment. Now what is the judgment in the present case? It is that the relator Morris Buttnick shall pay to the plaintiff in the court below for her

Feb. 1922]

Opinion Per HOLCOMB, J.

separate maintenance \$200 per month. That has been superseded. If that court can now enter another judgment requiring the relator to pay the same thing, then the supersedeas is a farce. This is apparent when one makes a practical application of it. Let us suppose that the superior court enters an order requiring the defendant to pay the plaintiff \$200 per month as separate maintenance pending appeal. Thereupon the relator would have to pay to the plaintiff for the month of January \$200 as separate maintenance. But that is precisely what the judgment appealed from requires him to do. If the relator's appeal shall be successful, he will have lost the benefit of the supersedeas."

The fact that the amount awarded for separate maintenance pending appeal, by the lower court, coincides with the amount awarded her in the court's general judgment is of no importance. It is simply that the trial court found that \$200 per month was necessary for the maintenance of the wife and her minor child, and of course the same amount would be necessary for her maintenance pending the appeal. The amount awarded in the judgment has been superseded, it is true, but it is not the same amount, although it coincides, that has been awarded by the trial court pending appeal. That is the amount necessary for the subsistence of the wife and her family as found by the court, and the suit money that is necessary for her proper preparation of her case upon the husband's appeal. The wife could not, as was said in *Lewis v. Lewis, supra*, in fact, make application until after the appeal had been taken, because she could not have known that the husband intended to appeal from the judgment. It is a new and separate interlocutory order or judgment, but as was said in *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 636, all sums paid in the way of alimony or suit money pending appeal may be considered in the final disposition of the case

and charged to the wife as the situation may require. The allowances so made after appeal were no part of the judgment appealed from, and are not superseded by the appeal. *Lewis v. Lewis, supra*.

Relator also insists that while suit money to enable the plaintiff to defend the appeal is not included in the judgment appealed from and superseded, it cannot be allowed because the marriage is denied, citing *State ex rel. Lloyd v. Superior Court*, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387.

The marriage is denied by relator in this way: He alleges in his amended answer and cross-complaint that the plaintiff and defendant intermarried at Victoria, B. C., May 16, 1900, at the insistent request of plaintiff, and that they were and are, as plaintiff well knew, nearer of kin to each other than second cousins of the whole blood, computed by the rules of the civil law, to wit: "That the father of defendant and the mother of plaintiff were brother and sister of the whole blood, and that plaintiff and defendant are first cousins, and therefore the marriage is void." It is further alleged that the plaintiff at all times knew that the marriage was illegal and void.

It was admitted by counsel for relator at the trial of the case, as appears by the return of respondent, that a marriage ceremony was performed in Victoria, B. C., on the date alleged, and that in that province the marriage of first cousins is legal and valid. It was also admitted that the parties lived and cohabited together for a number of years as husband and wife, under that marriage ceremony, and that three daughters were born as the issue of that marriage.

Since the principal case is coming here upon appeal, it is not proper for us to prejudge the validity or invalidity of the marriage relied upon by the plaintiff in

Feb. 1922]

Opinion Per HOLCOMB, J.

the case. It is sufficient to say that there is ample evidence and admissions of a *de facto* marriage, although relator insists that it is not a marriage *de jure*. In any event, it is very apparent that the plaintiff, in the action for separate maintenance, is acting in good faith, and it is indisputable that her side of the case, on appeal on the merits, should be thoroughly and carefully presented. Where a marriage was alleged by a wife and denied *in toto* by the husband, as in *State ex rel. Lloyd v. Superior Court*, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387, relied upon by relator, and the inability of the husband was at the same time alleged to prevent any order for the payment of alimony or maintenance pending the final hearing of the action, we should say that those issues call for a formal trial, as we said in that case. But in this case there has been a formal trial, and the trial court found in favor of plaintiff that there was a valid marriage between the parties, which, for present purposes, makes it a reasonably plain case as to the existence of the marriage relation. Its averment and denial in the pleadings did not bind the trial court, and upon a hearing the trial court found against the denial of the marriage. We must, therefore, indulge the presumption that the trial court was right, and that a legal marriage in fact existed, and that there is sufficient justification for the allowance of separate maintenance, and for the allowance of separate maintenance pending appeal, and suit money.

“The rule for allowing alimony *pendente lite* is based upon the existence, among other things, of the marriage relation; and, if the showing of all necessary facts is not made to appear at least *prima facie*, the court should not award it.” *Eickhoff v. Eickhoff*, 29 Colo. 295, 68 Pac. 237, 93 Am. St. 64.

In the same case it was held that:

“Where it appears, as here, that the legal proposition presented is a debatable one, concerning which able courts have disagreed, and no binding judicial determination has been had in the jurisdiction where the point is raised, we think it should not be decided upon an application for alimony *pendente lite*. Where, as in this case, the trial court has held, as appears to be the case, that the marriage alleged by plaintiff in her complaint was a legal and valid marriage, and the parties have lived together as married persons, we are not disposed, upon a review of its judgment for temporary alimony, to examine into this controverted question, etc.”

We are therefore of the opinion that, under the facts presented in this case, and the law obtaining in our jurisdiction, the writ prayed for should be denied.

Denied.

PARKER, C. J., MACKINTOSH, TOLMAN, MAIN, HOVEY, MITCHELL, and BRIDGES, JJ., concur.

Feb. 1922]

Opinion Per MACKINTOSH, J.

[No. 16959. Department Two. February 16, 1922.]

THE STATE OF WASHINGTON, *Respondent*, v.
FRANK CATALINO, *Appellant*.¹

INTOXICATING LIQUORS (49)—OFFENSES—UNLAWFUL POSSESSION—EVIDENCE—ADMISSIBILITY. In a prosecution for the illegal possession of intoxicating liquor, evidence of which had been obtained by means of a search warrant, it was error to deny the defendant the right to cross-examine the prosecuting witness as to the validity of the search warrant.

SAME (42)—OFFENSES—UNLAWFUL POSSESSION—COMPLAINT—SUFFICIENCY. A complaint charging that defendant "had in his possession intoxicating liquor other than alcohol," without stating the nature of such liquor nor that it was capable of being used as a beverage, was insufficient in that it did not apprise defendant of the crime with which he was charged.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 9, 1921, upon a trial and conviction of the unlawful possession of intoxicating liquor. Reversed.

S. A. Gagliardi, for appellant.

J. W. Selden and *T. F. Ray*, for respondent.

MACKINTOSH, J.—The appellant was convicted in the justice court, and subsequently, on appeal, in the superior court, on a complaint which charged that he "had in his possession intoxicating liquor other than alcohol." On the trial, the state introduced evidence that the appellant's dwelling had been entered and evidence obtained under a search warrant, which was introduced in evidence. The court denied the appellant the right to cross-examine the witness as to the validity of the search warrant.

Noticing this last claim of error first, we are inclined to believe that the court should have permitted the

¹Reported in 204 Pac. 179.

cross-examination, for it did not violate the rule that the trial court will not stop the trial for the purpose of inquiring into the manner in which the evidence is obtained, but that the defendant should, prior to the trial, apply to the court to have the evidence which he claims was unlawfully obtained suppressed. Such procedure could not, under the facts in this case, have been resorted to, for here the evidence was *prima facie* obtained lawfully, that is, at the time the search was made a search warrant was produced, and the first opportunity the appellant had to inquire into its validity was when it was introduced in evidence by the state.

Upon the question as to whether the complaint was sufficient, we are of the opinion that it was not, for it did not sufficiently inform the defendant as to what was charged against him, and it was so indefinite that a judgment upon it could not be used as a plea in bar to a further prosecution based upon the same facts. The statute under which the prosecution took place defines what constitutes intoxicating liquor, and provides that the possession of such intoxicating liquor capable of being used as a beverage is unlawful. The complaint did not state the nature of the intoxicating liquor which it alleged that the appellant possessed, nor did it state that the intoxicating liquor which he possessed was capable of being used as a beverage. So it is apparent that the appellant, reading the complaint, could not be apprised of the crime with which he was charged. See *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *State v. Muller*, 80 Wash. 368, 141 Pac. 910. Nor do we think that the cases of *State v. Bodeckar*, 11 Wash. 417, 39 Pac. 645; *State v. Moser*, 98 Wash. 481, 167 Pac. 1101; and *State v. Koerner*, 103 Wash. 516, 175 Pac. 175, hold to any contrary doctrine. The *Bodeckar* case merely held that it was not necessary to state in the

Feb. 1922]

Opinion Per MACKINTOSH, J.

information the name of the person to whom the sale was made. This was also the holding in the *Koerner* case, while in the *Moser* case it was merely held that the sale of intoxicating liquor to a minor rendered the defendant guilty, irrespective of his intention. It was not necessary to allege in the information in that case that the act had been done unlawfully or wilfully. In the *Koerner* case, the defendant was charged with unlawfully selling intoxicating liquor, in the exact language of the ordinance under which the defendant was prosecuted, it being unlawful for a druggist to sell intoxicating liquor. Here we have an entirely different situation. The statute does not make it a crime to have in possession intoxicating liquor, except such as is defined by statute.

The court should have granted the defendant's motion for arrest of judgment, and for that reason the judgment is reversed.

MAIN, HOLCOMB, and HOVEY, JJ., concur.

PARKER, C. J. (concurring)—I concur in the view that the case should be reversed because of the insufficiency of the complaint.

[No. 16795. Department Two. February 21, 1922.]

A. H. WICKENS, *Appellant*, v. P. C. SCHEUER, *Doing Business as Scheuer & Company, et al.*,
*Respondents.*¹

CARRIERS (14-2)—BILLS OF LADING—INDORSEMENT OR OTHER TRANSFER. Where it is the intention of parties to pass title to goods by the indorsement of a bill of lading, the title duly passes; and such intent is shown by letters of credit issued to an importer, which required the draft against it to be attached to a bill of lading, indorsed to the bank issuing the letter of credit, and required documents of title and insurance for the bank's protection.

SAME (10)—BILLS OF LADING—AUTHORITY OF AGENT. When a broker for an importer receives goods in transit to which title has passed to bankers under letters of credit and indorsement by the importee of bills of lading, the broker takes the goods as agent of the bankers, although the broker is unaware of the situation and was at the same time acting as agent of the importer in other matters.

SAME (14-2)—BILLS OF LADING—TRANSFER. The surrender by a broker of bills of lading upon delivery of the goods covered thereby would render duplicate bills void only so far as the carrier is concerned and would not affect the contract of other parties respecting such bills.

SAME (14-2). Where an importer never had possession of goods whose title had passed to banks on indorsement of the bills of lading to them on letters of credit issued to the importer, the fact that the importer had the right to obtain the goods upon payment of the sums due the banks would not subject the goods to any liability to his creditors.

ATTACHMENT (8)—PROPERTY SUBJECT—OWNERSHIP OR POSSESSION OF PROPERTY. The inchoate right of a debtor to obtain goods whose legal title and right to possession had been vested in banks upon payment of advances made by them, would not subject the goods to liability to attachment by his creditors.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 15, 1921, upon findings in favor of the defendants, adjudging the

¹Reported in 204 Pac. 780.

Feb. 1922]

Opinion Per HOVEY, J.

title to property seized under a writ of attachment, tried to the court. Affirmed.

Walter M. Harvey, for appellant.

Crowder & Crowder and *Ellis, Fletcher & Evans*, for respondents.

HOVEY, J. — The appellant sued the defendant Scheuer, a nonresident of this state, and attached certain goods in transit as the property of the defendant. Respondents Bankers Trust Company, Citizens National Bank of New York, and The Coal & Iron National Bank of the city of New York, obtained re-delivery of the goods by giving a bond, claiming the same as their own. The trial court found the goods to be the property of the respondent banks, relieved them of liability on their bonds, and gave them judgment for their costs. Subsequently, upon special appearance by the defendant Scheuer, the service of summons was quashed.

The facts in the case seem undisputed, but the transaction is nevertheless rather complicated. Scheuer & Company reside in New York and are importers. They obtained from the respondent banks letters of credit in varying amounts. These they sent to their agent in Yokohama. This agent purchased the merchandise in question, presented the letters of credit to the Yokohama Bank, together with bills of lading for the goods, and obtained from the Yokohama Bank the money to pay for the goods. The bills of lading were in quadruplicate in each case and were indorsed by Scheuer & Company, and in each case the Yokohama Bank drew a draft on the respondents for the sum advanced, attached to a copy of the bill of lading, except in the case of respondent Coal & Iron National Bank of the City of New York, where the draft was drawn upon the cor-

respondent of this respondent in London. The letters of credit are for different sums and are in the following form:

“Gentlemen:

“We herewith beg to open with you a credit in favor of Messrs. Scheuer and Company, Yokohama, Japan. For any sum or sums not exceeding in all Three Thousand (3000-0-0) Pounds Sterling.

“For the account of Messrs. Scheuer and Company, New York City, Against shipment of Merchandise.

“For which they will value or order to be valued on you at one hundred twenty days’ sight.

“Drafts to be accepted only against delivery of abstract of invoice and duplicate Bill of Lading to the order of the Coal and Iron National Bank of the City of New York with exceptions stated hereafter.

“Consular Invoice and original Bill of Lading to be sent direct to the Coal and Iron National Bank of the City of New York with exceptions as stated below.

“Insurance to be effected in New York, loss, if any, made payable to the Coal and Iron National Bank of the City of New York also mine risk.

“All drafts against this Credit to be drawn and negotiated before December 31, 1919, and to contain the clause ‘Drawn under Coal and Iron National Bank Letter of Credit No. 1542, dated, New York, August 13th, 1919.’

“If Bills of Lading are made out to ‘order’ the full set must accompany draft, otherwise satisfactory guarantee for missing Bills of Lading will be required in London with exceptions stated below.

“We hereby agree with the drawers, endorsers and bona-fide holders of bills drawn in compliance with the terms of this credit that the same shall be accepted on presentation and paid at maturity.

“In case of shipments to San Francisco, Cal., documents to be sent to Southern Pacific Railway Co.

“For Seattle or Tacoma shipments, the documents to be sent to Ocean Brokerage Co., 762 Stuart Bldg., Seattle, Washington. For Vancouver, B. C., shipments, documents to be sent to Crickmay Bros., 325

Feb. 1922]

Opinion Per HOVEY, J.

Howe Street, Vancouver. In the foregoing cases the negotiating bank must attach a certificate certifying that documents were forwarded according to conditions herein set forth, which shall be: Consular Invoice, Two Bills of lading to order, duplicate invoice and copy of bills of lading to be attached to draft. All other shipments, documents to be sent to The Coal & Iron National Bank."

The Ocean Brokerage Company, mentioned in the letters of credit, were doing a brokerage business in the city of Seattle and had theretofore acted as agents for Scheuer & Company. Two copies of the bills of lading were forwarded to the Ocean Brokerage Company and they obtained the goods upon their arrival in Seattle and reshipped the same to various consignees in New York City, in the name of Scheuer & Company as consignors. They did not have any actual knowledge of the connection of the respondent bankers with the transaction.

Subsequent to the commencement of this action, the drafts of the Yokohama Bank were paid upon presentation, and thereafter Scheuer & Company executed in favor of each bank a trust receipt, by the terms of which title to the goods was retained by the banks until they should be paid the sums due them, but Scheuer & Company were to be permitted to have the custody of the goods, subject to the reserved title.

It is contended by appellant that the transaction is simply a purchase of goods by Scheuer with a pledge of title to the respondent banks as security, and that, the legal title being in Scheuer, the goods would be subject to attachment for debts owing by them.

The effect to be given an indorsement of a bill of lading depends upon the intention of the parties. Scrutton on Charter Parties and Bills of Lading (9th ed.), p. 170. And where the title is intended to be

passed, this will be the effect of the transaction. 10 C. J. 204. The language of the letter of credit in this case, the provision for the forwarding of the documents of title, and the provision for insurance, satisfies us that it was the intention of the parties to vest title in the banks advancing the money. Procedure was initiated when the letters of credit issued, and as soon as the bills of lading were delivered and the money advanced in accordance with the letters of credit, title thereupon became vested in the banks. When the goods were received by the Ocean Brokerage Company they took them in this case simply as agents of the respondent banks, in accordance with the provisions of the letters of credit. The fact that they were unaware of the situation could not change the legal status as to title. The fact that the Ocean Brokerage Company was the agent of Scheuer & Company in other matters would not make them such in this instance in derogation of the title held by the banks.

It is contended by appellant that whatever effect may be given to the bill of lading in the first instance in favor of the respondents would be lost because the goods were surrendered to the Ocean Brokerage Company upon the production of the bills of lading held by them. This simply would have the effect upon the contract of ocean carriage and would render the other bills of lading void so far as the carrier is concerned, but would not affect the contract of the parties primarily concerned.

It is further contended that the contract could not be effective as against creditors because it involved the element of the right of Scheuer & Company to obtain the goods upon payment of the sums due, but, in our view, this does not affect the matter, for the reason that possession of the goods was never in Scheuer & Company.

Feb. 1922]

Opinion Per HOVER, J.

We deem the following cases to be in point in the present case: *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Charavay & Bodvin v. York Silk Mfg. Co.*, 170 Fed. 819; *Walsh, Boyle & Co. v. First Nat. Bank*, 228 Ill. 446, 81 N. E. 1067; *Mather v. Gordon*, 77 Conn. 341, 59 Atl. 424; *American Nat. Bank v. Henderson*, 123 Ala. 612, 26 South. 498, 82 Am. St. 147; *In re Dunlap Carpet Co.*, 206 Fed. 726; *Century Throwing Co. v. Muller*, 197 Fed. 252; *In re Cattus*, 183 Fed. 733; *In re Coe*, 183 Fed. 745; *First Nat. Bank v. Mt. Pleasant Milling Co.*, 103 Iowa 518, 72 N. W. 689.

In our opinion, the right of Scheuer & Company to obtain these goods upon the payment of the sums due the respondent banks who had the legal title and the right to possession of the same, was not such an interest in the property as would be the subject of attachment.

The judgment appealed from is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ.,
concur.

[No. 16794. Department Two. February 23, 1922.]

ASIA INVESTMENT COMPANY, *Appellant*, v. LOUIS LEVIN,
Respondent.¹

VENDOR AND PURCHASER (1) — CONTRACT — SALE DISTINGUISHED FROM OPTION. Where a contract for the sale of real property recites the receipt of a stated sum "on account of the full purchase price" named in the instrument, and is followed by provisions to the effect that a warranty deed is to be delivered on receipt of the balance of the purchase price in cash, that taxes for the assessment year are to be prorated, and that failure to complete purchase within the time limited, except for defect of title, shall operate as a forfeiture of the sum deposited, such contract constitutes a contract of purchase and sale, and not an option to purchase.

DAMAGES (32)—LIQUIDATED DAMAGES OR PENALTY—CONSTRUCTION OF CONTRACT. A provision in a contract for the sale of land for forfeiture of the sum deposited by the purchaser on failure to complete the purchase within the time stated which deposit shall be in settlement of, and fixed as, liquidated damages, is one providing for liquidated damages instead of penalty.

SPECIFIC PERFORMANCE (24)—DAMAGES (37)—LIQUIDATED DAMAGES—EFFECT OF STIPULATION FOR—BREACH OF CONTRACT FOR SALE OF LAND. A provision in a contract for the sale and purchase of land fixing liquidated damages does not destroy the vendor's right of election between an action for damages and one for specific performance, unless the course of conduct of the vendor indicates that he has accepted the provision for liquidated damages as being the full measure of his rights.

DAMAGES (32, 37)—LIQUIDATED DAMAGES—EFFECT OF STIPULATION—CONSTRUCTION OF CONTRACT. The provision in a contract of sale and purchase of land that the failure of the purchaser to complete the purchase shall operate as a forfeiture of the sum deposited, "the same being in settlement of and hereby fixed as liquidated damages" should be interpreted as meaning that the sum paid down should be taken "in settlement . . . of liquidated damages," the amount of which "being hereby fixed as liquidated damages"; such interpretation preserving the rights of both parties under the contract, thus entitling vendor to specific performance.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 16, 1920,

¹Reported in 204 Pac. 808.

Feb. 1922]

Opinion Per MACKINTOSH, J.

upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Walter M. Harvey, for appellant.

Harold L. Levin, A. O. Burmeister, and J. H. Gordon, for respondent.

MACKINTOSH, J.—The appellant and respondent entered into the following contract:

“Los Angeles, Cal., Feb. 17, 1920.

“Received of Asia Investment Company, a Washington corporation, the sum of Five Hundred Dollars lawful money of the United States on account of the full purchase price of \$10,000 of the real property hereinafter described and hereby sold to said Asia Investment Company by the undersigned. The purchaser shall have thirty (30) days within which to search the title, and the seller shall have fifteen (15) days within which to perfect the same and correct any defects reported in writing by the purchaser to the seller. Grant, bargain and sale Warranty Deed to be delivered on receipt of balance of purchase price in cash. Taxes to be pro-rated for year 1919-20. Failure of purchaser to complete purchase within time stated, except for defect of title, shall operate as a forfeiture of sum hereby deposited, the same being in settlement of and being hereby fixed as liquidated damages.

“The real property herein referred to is described as follows: All that certain lots and parcels of land situated in the City of Tacoma, State of Washington, and described as follows: Lots 1 and 2 in Block 408, being the Southwest corner of 4th and St. Helens Avenue, free and clear of all incumbrances.”

The appellant paid the \$500 called for in the contract and afterwards began this suit to recover the same, alleging that it had tendered the balance due on the contract and demanded the deed, which respondent had refused to deliver. The respondent, in his answer, denied the refusal to deliver the deed, and the court

upon the trial found that the respondent had tendered to the appellant a proper warranty deed and had demanded compliance with the terms of the contract, which the appellant had refused. As a cross-complaint, the respondent alleged the tender of the deed and demanded judgment for the balance of \$9,500, and for specific performance of the contract. The trial court found for the respondent on his cross-complaint, and entered judgment in the sum of \$9,500, with interest, and directed that the deed be delivered to the appellant upon the satisfaction of the judgment. The appellant has appealed from that judgment against it.

There is no question before us upon the appellant's cause of action stated in its complaint. It is conceded that it is not entitled to the return of the \$500, the only question being as to whether the judgment based upon the respondent's cross-complaint can be sustained.

The first point to be determined is as to the effect of this contract, it being the claim of the appellant that it is not a contract of purchase and sale, but merely an option of purchase, for the reason that there is no provision in the contract making it obligatory upon the appellant to purchase the property. Jurisdictions have differed from one another and in themselves in the interpretation of contracts such as that here before us, and it is difficult to harmonize all the decisions, as they are naturally based upon the interpretation which courts have given to differing facts. This court has had before it several contracts more or less resembling the one in this case, and in *Jones & Co. v. Eilenfeldt*, 28 Wash. 687, 69 Pac. 368; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; and *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131, has held that the contracts were contracts of option, and not such as compelled the vendee to complete the purchase. In the cases of *Anderson v. Wallace Lumber etc. Co.*, 30 Wash. 147, 70 Pac. 247;

Feb. 1922]

Opinion Per MACKINTOSH, J.

Conner v. Clapp, 42 Wash. 642, 85 Pac. 342; *Newell v. Lamping*, 45 Wash. 304, 88 Pac. 195; and *Wright v. Suydam*, 72 Wash. 587, 131 Pac. 239, it had for consideration contracts which it has held were contracts not of option, but under which the vendee could be compelled to take title and pay the purchase price. It is difficult to lay down a hard and fast rule which will properly classify a given contract. But the law seems to be that, although the contract does not expressly provide that the vendee agrees to consummate the sale by paying the balance and accepting the deed, yet, where it appears that the general intention was to consummate a sale, the absence of an express agreement does not limit the contract merely to one of option, but that it will be held to be a contract of purchase and sale. As was stated in *Anderson v. Wallace Lumber etc. Co.*, *supra*:

“It purports to be an express agreement to convey the timber land, was so accepted by the defendant, and was so construed by the parties thereto; and a deed was thereafter drafted in pursuance thereof, by direction of defendant’s officers, and executed by plaintiff; but defendant refused to receive the same.”

The court holding that the contract was not an option to purchase.

In *Wright v. Suydam*, *supra*, the contract was held not to be an option for the reason that it stated, as does the contract before us, that the first payment was received as part payment upon the purchase price, and in that contract, as in the one here, there followed provisions which clearly contemplated the consummation of the sale, and the court held such an agreement amounted to an agreement to sell on the part of the vendor, and an agreement on the part of the vendee to purchase. It was further said in that case the fact that the vendor’s remedy was limited expressly by the

contract to the recovery of liquidated damages did not change the fact that the contract was a contract of purchase and sale on the part of one party, and the promise to purchase of the other. The court said:

“An agreement in a contract, specifying and limiting the particular remedy available to a party to the contract upon the breach thereof by the other, does not change the respective mutual promises which constitute the substance of the contract. Wright did not contract and pay for a mere privilege to purchase land at a future time, but he agreed to purchase and paid part of the purchase price. We are of the opinion that the contract is one for the sale of land, both parties being bound thereby as seller and purchaser, respectively, though the remedy of Suydam upon breach by Wright may be confined to liquidated damages.”

Upon this point, therefore, we hold that in this case there was a contract of purchase and sale, which raises another point, and that is, whether the contract, by its terms, limited the respondent's right to the retention of the \$500 in full settlement of the entire matter. It is the claim of the appellant that the stipulation, “failure of purchaser to complete purchase within the time stated, except for defective title, shall operate as liquidated damages,” is a provision for full settlement of all the rights under the contract, and prevents the respondent from resorting to specific performance.

It is necessary, first, to determine whether this provision in a contract is one for a penalty or for liquidated damages. The law seems to be settled that provisions in contracts of sale calling for penalties do not exclude the right of the vendor to require specific performance. *Howard v. Hopkyns*, 2 Atk. 371; *Raymond v. Caton*, 24 Ill. 123; *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429; *Cartwright v. Gardner*, 5 Cush. (Mass.) 273; *Whitney v. Stone*, 23 Cal. 275. This is also the rule in those cases where the contract is called “void” upon

Feb. 1922]

Opinion Per MACKINTOSH, J.

the breach by the vendee of his covenants. *Westervelt v. Huiskamp*, 101 Iowa 196, 70 N. W. 125; *Canfield v. Westcott*, 5 Cowen (N. Y.) 270; *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310; *North Stockton etc. Co. v. Fischer*, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438; *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177.

Under the authority of *Smith v. Lambert Transfer Co.*, 109 Wash. 529, 187 Pac. 362, we must hold that the provision in the contract before us is one calling for liquidated damages. The *Smith* case contains a review of all the prior decisions of this court touching upon penalties and liquidated damages, and lays down the rule for the interpretation of such provisions as nearly as may be, in view of the multifarious circumstances under which those questions are presented to the court.

Having passed this point in the interpretation of this contract, it becomes necessary to consider whether provisions for liquidated damages destroy the vendor's right to any other form of relief. It will be conceded that, in the absence of any provision for liquidated damages in a contract of purchase and sale, such as we have determined this to be, that the vendor, upon the breach, may either sue for damages which have been occasioned by the vendee's failure to comply with the contract, or he may resort to an action for specific performance of the contract. It does not seem logical to conclude that because the measure of the recovery in an action at law for the breach has been mutually fixed by the parties in the contract, that thereby is destroyed the vendor's right of an election between the two remedies. The effect of placing in the contract the measure of damages merely is to render certain the amount that the vendor is entitled to retain if there has been a payment, or to recover in an action at law,

and does not operate to deprive him of all his right to elect to proceed in an equitable action for specific performance. It is true, of course, that provisions for liquidated damages in such contracts may measure the entire right of the vendor in the event of breach, where the contract indicates that to be the result which both parties had in mind. Or, stated in the language of the decisions, where the stipulation in regard to liquidated damages is to be regarded as security for the performance of the contract by the vendee, then specific performance may be had by the vendor, but where the stipulation was intended as a substitute for performance—where the vendee might comply with the contract or pay liquidated damages in lieu thereof—then specific performance is not available. *Koch v. Streuter*, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; *Davis v. Isenstein*, 257 Ill. 260, 100 N. E. 940, 45 L. R. A. (N. S.) 52; *Donahoe v. Franks*, 199 Fed. 262; *Thornburgh v. Fish*, 11 Mont. 53, 27 Pac. 381; *Dana v. St. Paul Inv. Co.*, 42 Minn. 194, 44 N. W. 55.

We will admit that this is not the universal rule, and that there are many expressions in text books and decisions to the effect that the vendor must look solely to the stipulation for liquidated damages. Those interested may find a discussion of the question in the notes to *Koch v. Streuter*, *supra*, as reported in 2 L. R. A. (N. S.) 210, and *Davis v. Isenstein*, *supra*, as reported in 45 L. R. A. (N. S.) 52, where the question is summarized in this quotation, which we adopt:

“If it be determined that the stipulation is for liquidated damages, then, according to the better opinion, the question whether it will prevent specific performance will depend upon the question whether it was intended as an alternative for the acts agreed to be specifically performed, or merely as a security for the performance of such acts; in the former case, the court will ordinarily deny the remedy of specific

Feb. 1922]

Opinion Per MACKINTOSH, J.

performance and refer the plaintiff to his remedy at law; and in the latter case it will grant specific performance if such remedy is otherwise proper.”

Of course, it is to be recognized that, if the vendor, by his conduct, has so acted that he has accepted the provision for liquidated damages as being the full measure of his rights, he cannot then be allowed to compel performance. In this case the record does not show that there has been any such conduct on the part of the respondent as to indicate that he had bound himself to the retention of the \$500 as the full measure of his rights under the contract.

What is probably the most difficult question in this case now presents itself, and that is, whether this provision in the contract in regard to liquidated damages should be interpreted as an agreement between the parties so that the vendor's right to specific performance has been foreclosed. In other words, whether the language of the phrase which we have set out means that all the rights of the vendor under the contract have been settled, and that the sole relief for the vendee's failure to comply lies in the retention of the amount agreed upon as liquidated damages. Although vendors have the right either to a suit in law for damages or one in equity for specific performance, they can, by so agreeing in the contract, waive their right to recourse to either or both of those remedies, and if it appears that the vendor has agreed that liquidated damages shall be the exclusive resort, or, on the other hand, that he may only maintain an action for specific performance, full effect will be given to such an agreement. We are called on, then, to interpret the meaning of the phrase, “the same being in settlement of and being hereby fixed as liquidated damages.” Assuming that this phrase is ambiguous, it should be given such interpretation as not

to deprive the parties using it of any of their rights. Unless it is clear that it was the intention that the parties definitely decided to limit their rights, the courts will not interpret language to have that effect. In other words, language in contracts which is subject to two interpretations will be so interpreted as to preserve the rights of all the parties, rather than be interpreted in such a way as to destroy the rights of either one. Applying this rule to the language here, it would seem to be that the proper interpretation to give it is that the \$500 paid should be taken "in settlement of . . . liquidated damages," the amount of which "being hereby fixed as liquidated damages." This interpretation preserves to both the parties all the rights they would have under the contract, whereas an interpretation which would hold that the words "in settlement of" referred to the settlement of all the rights of the parties under the contract, would result in depriving the vendor of his right to resort to an action for specific performance.

In the case of *Wright v. Suydam, supra*, the contract provided for liquidated damages, and "neither party shall be put to any further liability," yet in that case this court allowed the vendee to compel specific performance, although holding that the language just quoted prevented the vendor from compelling specific performance.

Being satisfied that this contract was one of purchase and sale, and that the provision contained in it is one for liquidated damages, we are in agreement with the trial court in holding that the respondent is entitled to specific performance, and the judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16640. Department One. February 23, 1922.]

PUBLIC SERVICE COMMISSION *et al.*, Appellants, v. THE
STATE OF WASHINGTON, *on the Relation of Great
Northern Railway Company, Respondent.*¹

CARRIERS (6)—REGULATION OF RATES—PREFERENCES AND DISCRIMINATIONS. The public service statute does not contemplate that the charge made by a carrier for a particular class of service shall always be exactly the same to all shippers, but it does require the fixing of a tariff which is general and public, rather than individual, and that shipments under it be made according thereto, and not according to exceptions to it.

SAME (6). The fact that a timber company at its own expense furnishes facilities for the shipment of its logs, such as constructing steel bunks on the cars, providing train loads of logs to the railroad, which does away with switching, coupling and spotting of cars and furnishes extra help in unloading its cars, thus enabling each car to be loaded and unloaded once in each 24 hours, for which service it is charged the same freight rates as other shippers who do not furnish such facilities, does not show discrimination against it in favor of such other shippers.

SAME (6). A freight charge to a shipper furnishing train load lots of a less rate than to a competitor furnishing less than train load lots is unlawful, as in effect allowing lower rates upon a condition which only a few shippers can comply with.

SAME (3-1, 6)—REGULATION—POWERS OF COMMISSION—DISCRIMINATION. A public service commission in fixing freight rates may, under certain conditions, take into consideration things done by shippers which would reduce the cost of transportation, provided they are of such importance as to distinguish such shippers from others, but they should be individual acts of material consequence and not a number of acts each of small significance.

SAME (3-1, 6). Where a public service commission, in determining the fairness of a carrier's rate schedule, undertakes a comparison with the charges of other carriers, it should take into consideration such circumstances as the distance of the haul, the amount of competition, the amount of money invested in the particular road bed and equipment, and other like things.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered July 8, 1921, re-

¹Reported in 204 Pac. 791; 207 Pac. 688.

versing an order of the public service commission fixing rates for hauling logs, after a hearing before the court. Remanded for further proceedings.

The Attorney General and Raymond W. Clifford, Assistant (Cooley, Horan & Mulvihill, of counsel), for appellants.

Thomas Balmer and Edwin C. Matthias, for respondent.

Geo. T. Reid, C. H. Winders, and L. B. da Ponte, amici curiae.

BRIDGES, J.—This is a rate making case. The Wallace Falls Timber Company is engaged in the logging business near the town of Gold Bar, in Snohomish county, Washington. It has been in the habit of shipping its logs by the railroad of the respondent to the city of Everett, a distance of approximately 30 miles. On the 26th of August, 1920, the respondent filed with the public service commission of this state (now the department of public works) its schedule or tariff of rates for hauling logs from Gold Bar to Everett. The charge fixed was \$2.27 per thousand feet, board measure, log scale. Previously the charge for the same service had been \$1.85 per thousand feet. After the filing of the new schedule, the Wallace Falls Timber Company made complaint to the public service commission on the ground that the charge of \$2.27 per thousand feet was unreasonable, unjust, unfair, discriminatory and unlawful. After a hearing, the commission ordered the respondent to cancel and annul its schedule fixing the tariff of \$2.27, and prescribed a rate of \$1.85 per thousand feet, and directed the respondent to file a schedule to that effect. Thereafter the respondent here sued out a writ of review in the superior court of Thurston county against the public serv-

Feb. 1922]

Opinion Per BRIDGES, J.

ice commission and its members, and after a hearing that court reversed and set aside the order made by the commission. The latter has appealed to this court.

The findings of fact made by the commission are, in part, to the effect that the timber company is the owner of a large amount of standing timber in the vicinity of Gold Bar, from which station the logs manufactured therefrom by it are transported to tide water at Everett; that the timber company so carries on its business that logs to be transported by the railroad company are delivered to it by the timber company "in full train load lots, fully made up and prepared for immediate movement, no switching, coupling or spotting of cars being necessary on the part of the railroad company"; that at Everett the timber company has so arranged its dumping and unloading facilities that cars loaded with logs are immediately dumped and unloaded upon their arrival at Everett, and that each car in the service is loaded and unloaded once in each 24 hours; that the timber company maintains a night service in dumping and unloading cars, at a monthly cost to it of approximately \$400 over and above the ordinary and usual expenses in connection with the unloading of cars; that the timber company has expended about \$250 per car in equipping the cars furnished to it by the railroad company, with steel bunks and stakes, which improvements make less repairs for respondent; that, by reason of the manner in which the timber company conducts its logging business, the railroad company is enabled to "transport said logs at less cost and expense to it than is ordinarily incurred by said railroad company in the transportation of logs of companies which do not conduct their business in the manner aforesaid, and which do not furnish and maintain the equipment hereinbefore referred to";

that the charge of \$2.27 per thousand feet "is in excess of the rates charged by other like carriers for log hauls of similar distances in the state of Washington; that the commission is satisfied that, because of the way in which the timber company does its business and furnishes logs for transportation, the railroad company can transport the logs at a materially lower rate than \$2.27, and that "the logging rates of other railroads for transporting logs for similar distances in the state of Washington are approximately \$1.85 per thousand feet . . . which would be and is a reasonable rate to be charged and applied in this case for transporting logs from Gold Bar to tide water at Everett."

The respondent contends that, in fixing the rate in this case, the commission had no right to take into consideration many of the matters shown in the findings, and that it acted on a fundamentally wrong idea or basis. On the other hand, the commission contends that, since the cost of transportation is an important feature of rate making, it was not only proper but essential that it consider and be influenced by such acts and services of the individual shipper as tended to reduce the cost of transportation.

It has long been recognized that rate making is far from a scientific process. The general purpose of the public service act was to put a stop to certain well-known abuses which had already grown up in the business of transportation, and to make it impossible, as nearly as might be, for other similar abuses to be carried on in the future. According to its provisions, rates should be, as nearly as possible, just and reasonable to all parties concerned, and all persons shipping similar products, under similar circumstances, for like distances should be treated alike as nearly as possible, and that there should be no rebates, and that there

Feb. 1922]

Opinion Per BRIDGES, J.

should be no discrimination in favor of one shipper and against another. We are satisfied that, in reaching its conclusions, the commission erroneously considered certain conditions found by it to exist, such as that the timber company furnished train loads of logs, did not require switching, furnished extra help in unloading the cars, and at its own expense constructed steel bunks on the cars furnished by the respondent.

(1) In the first place, the public service statute does not contemplate that the charge made by a carrier for a particular service shall always be exactly the same to all shippers. Such a result, in the nature of things, would be impossible of accomplishment. It hopes to accomplish general and not exact justice. The schedules provided by the statute to be filed contemplate a tariff to be charged for a service which is general and public, rather than individual—a service to the many and not to the few. It contemplates that, so long as the schedule or tariff is in force, shipments under it must be made according thereto, and not according to exceptions to it. If the schedule is to be one for the public, then manifestly it cannot take into consideration the numberless small differences in shipment. The business involved here will serve to illustrate the point we have in mind. Suppose there are several shippers to and from the same points. One furnishes full train loads, improved and expensive bunks, extra service at the unloading place, and does not require any switching; another furnishes all these things but the extra service in unloading, another all but the improved bunks, another all except the train loads, another all but the switching. Each shipper would thus do something which would tend to reduce the haul cost. The difference is in degree only. If all these things must be considered in filing schedules or in fixing rates, then there would have to be as many different schedules or

rates as there are shippers. Manifestly, such a procedure would be so heavy as that it would fall because of its weight. Schedules would be for individuals and not for the public—would be for a private and not a public service. In fixing rates the commission would be required to take into consideration every feature which tended to lessen the cost of transportation.

(2) It is perfectly manifest that the things which the timber company does, as found by the commission, are done by it more for the purpose of making it possible for the carrier to give it better and increased service than for the purpose of lessening the cost of the transportation. If the timber company thus adds to its cost, it is repaid by receiving more service, and if the respondent can, because of what the shipper does, carry the product at a somewhat less cost than otherwise, it repays the difference in more competent service. If it cost the respondent something less to transport the logs of the timber company than of some rival company, the difference is equalized by the former receiving a better service than the latter. So considering the question, it cannot be said that the timber company is being discriminated against in favor of some other shipper, or that the railroad should transport its logs at a price less than that charged to a rival company who does not do the things which would give it the more efficient service that the timber company gets.

(3) The commission should not have considered the fact that the timber company shipped by train loads, thus tending to make the cost of transportation less. The various commissions and the courts have held that to charge one furnishing train load lots a less rate than a competitor furnishing less than train load lots is unlawful because it is in effect "allowing lower rates

Feb. 1922]

Opinion Per BRIDGES, J.

upon a condition which only a few shippers can comply with and, consequently, is an injustice to those unable to ship the required quantity." *Planters' Compress Co. v. Cleveland, C. C. & St. L. R. Co.*, 1 I. C. C. 382 [402, 403]; *Providence Coal Co. v. Providence & W. R. Co.*, 11 I. C. C. 107; *Anaconda Copper Mining Co. v. Chicago & E. R. Co.*, 19 I. C. C. 592; *Burlington C. R. & N. R. Co. v. Northwestern Fuel Co.*, 31 Fed. 652; Watkins, Shippers and Carriers (3d ed.), § 159.

We do not mean to hold that under no circumstances should the commission, in fixing rates, or the transportation company in fixing schedules, consider and be influenced by things done by the shipper which would reduce the cost of transportation. Beyond question, such conditions will arise. But they should be of such importance as to at once distinguish such shippers from others. They should be individual acts of material consequence, and not numerous acts each of small significance. Any other rule would seem to make the public service act cumbersome and unworkable. We realize that the statute invests the commission (now department) with broad powers and that the courts should be slow to interfere with its decisions, but we are also forced to the conclusion that the logic of the decision which we are reviewing would lead to such complications as would ultimately destroy the virtues of the public service act.

But the appellant contends that, inasmuch as the commission found that the average logging rate of other railroads for transportation of logs for similar distances is \$1.85 per thousand feet, board measure, it was authorized to fix the same rate here. But we are not convinced by this argument. It is certainly entirely proper for the commission to make comparisons under proper circumstances between a charge made by one carrier and that made by another, but in mak-

ing such comparisons all of the circumstances should be taken into consideration, such as the distance of the haul, the amount of competition, the amount of money invested in the particular road bed and equipment operated thereon, and other like things. In this instance the commission does not seem to have gone to this length, but only found that other railroads carried logs for a like distance as that involved here for \$1.85 per thousand feet. But even should it be considered that the commission, in making the comparison, had taken into consideration all the things which we have enumerated, yet we are satisfied that it would not have been justified, on that ground alone, in fixing the rate as it did, for in another of its findings it expressly found "that the rates and tariff charges fixed by the respondent and other railroad companies within the state of Washington for the transportation of logs have been arbitrarily fixed and determined by said railroad companies, in many instances, without any reference to the cost of service rendered, and out of proportion to the charges exacted by other shippers for similar services for like distances, and the log rates of this state, as a whole, are inequitably constructed, and in many cases are neither fair nor just," and that the commission (department) is now in the process of making an examination into the whole log rate question, with the view of establishing fair and equitable rates concerning that tariff. If such be the general condition with reference to log rates, then certainly it would not be fair nor just for the commission to fix rates in this particular instance by comparison with such unjustifiable rates as other carriers impose.

Other questions are presented which we do not find it necessary to discuss.

The judgment of the trial court merely reversed and set aside the order of the commission. It seems to us

Feb. 1922]

Opinion Per Curiam.

that the whole matter ought to be referred back to the commission to reconsider the testimony in the spirit consistent with what we have said in this opinion, and if it is thought best, take additional testimony.

The cause is remanded to the superior court, with directions to add to the judgment already made by it the idea that the whole matter is again referred to the commission, in order that it may act in consonance with this opinion. The respondent will recover costs here.

PARKER, C. J., MITCHELL, and TOLMAN, JJ., concur.

ON REHEARING.

[*En Banc.* June 20, 1922.]

PER CURIAM.—This cause was reargued before the court *En Banc* on May 31, 1922. Deeming ourselves fully advised in the premises, the court adheres to the views and conclusions announced in the decision of Department One, and for the reasons therein expressed, the cause is remanded to the superior court with directions as therein contained.

[No. 16843. Department Two. February 23, 1922.]

AUGUST TUCKER, *Appellant*, v. M. LOWENTHAL *et al.*,
Respondents.¹

COSTS (11)—MORTGAGES (242)—FORECLOSURE—ATTORNEY'S FEES—TENDER BEFORE SUIT. A mortgagee is not entitled to recover costs and attorney's fees in a suit to foreclose a mortgage, where foreclosure was denied on the ground that the money to satisfy the mortgage had been duly tendered at or prior to maturity and the tender had been kept good.

TENDER (4)—MODE AND SUFFICIENCY. Facts in case examined and held to constitute proper tender.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 6, 1921, in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Affirmed.

J. W. Anderson, for appellant.

Harry H. Johnston, for respondents.

Hovey, J.—This case involves a question of attorney's fees and costs. Appellant owned a mortgage upon property belonging to respondents, and, prior to the maturity of the debt, respondents forwarded to a bank in Tacoma the amount which they considered due, with directions to notify H. W. Lueders, who had acted as attorney for the appellant in drawing the mortgage. Through an oversight the remittance was \$10 short, but this was corrected and the full amount deposited before the loan became due. The body of the note does not contain any requirement as to the place of payment, but one of the notations on the corner is "At 408 Bk Cal Tacoma Wash," which was the office address of Mr. Lueders. Mr. Lueders claimed a debt due him personally from the mortgagors, and he there-

¹Reported in 204 Pac. 773.

Feb. 1922]

Opinion Per HOVEY, J.

upon sued them in the justice court and garnished the bank where the money had been deposited. Mr. Lueders and the respondent personally visited the bank where the money was deposited and the latter offered to turn over the money if the fund were released from the garnishment, but this Mr. Lueders declined to do. The respondents, through their attorney, offered to deposit ample funds to meet the liability claimed in the garnishment proceeding, but were unable to secure a release. The suit of Mr. Lueders was subsequently settled and he immediately brought suit as attorney for appellant to foreclose the mortgage. Respondents kept their tender good for the original amount of the debt, with interest up to the original date of maturity, and the trial court denied foreclosure and gave the respondents their costs. Appellant contends that he should have been allowed an attorney's fee and his costs of suit.

In our opinion, a proper tender was made in the first instance and respondents should not be held for more under the facts of this case.

The judgment appealed from is affirmed.

PARKER, C. J., HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 17015. Department Two. February 24, 1922.]

MARTIN SWENLAND, *Respondent*, v. THOMAS GREGORY
et al., *Appellants*.¹

APPEAL (272)—RECORD—STATEMENT OF FACTS—AFFIDAVITS. Misconduct of the jury in rendering a quotient verdict will not be considered on appeal when the affidavits relative thereto are not made a part of the statement of facts.

SAME (151½)—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS—TIME AND MANNER OF TAKING. An erroneous instruction respecting damages recoverable by a parent for the death of a minor child will not be considered on appeal, where objection was not raised by motion for nonsuit, judgment non obstante, nor a directed verdict, and where the written exception to the instruction was filed with the clerk three days after judgment without ever having been called to the attention of the trial court.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 26, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Browder Brown and J. W. A. Nichols, for appellants.

HOVEY, J.—Respondent recovered judgment against appellant in the sum of \$3,667, upon a cause of action arising from the alleged negligent killing of the minor child of respondent by appellant's automobile.

The accident happened at Parkland, on the road to Mount Rainier, within the limits fixed by law for a maximum speed of twelve miles per hour in front of a public school. The roadway is paved sixteen feet wide, and has shoulders of about four feet on either side. Albert Swenland, a boy seven years of age, was walking with two other boys on the highway, and the evidence seems clear that he was struck while off the pavement. The testimony of the respondent's wit-

¹Reported in 204 Pac. 597.

Feb. 1922]

Opinion Per HOVEY, J.

nesses shows that the appellant's car, a Cadillac roadster weighing thirty-four hundred pounds, was traveling at a speed in excess of twenty-five miles per hour; that it turned to the left to pass a Ford, and immediately upon passing the other car, and while still at the high rate of speed, struck the boy, and the boy when picked up was off the pavement, and he died shortly afterward from the injuries received. It is the contention of appellant that he was driving not to exceed ten miles per hour, and that when he first saw the boys they were off the pavement, but that this boy jumped on the pavement, and to avoid striking him the appellant turned to the right and partly off the pavement, and that when the boy saw the car for the first time, he jumped off the pavement and in the line of travel of the car, and that the accident was unavoidable on the part of appellant.

The undisputed facts show a case for care in operating the car, and while the evidence of respondent's witnesses is not entirely clear as to all the details, sufficient is shown from which the jury might find that appellant was negligent and that decedent was not guilty of contributory negligence.

The action is predicated upon § 184, Rem. Code (P. C. § 8264), and the other errors assigned may be summarized as follows:

(1) Misconduct of the jury in having rendered a quotient verdict. The affidavits relative to this matter are not made a part of the statement of facts and cannot be considered upon this appeal. *Thurman v. Kildall*, 80 Wash. 283, 141 Pac. 691, wherein our previous decisions on this subject are reviewed.

(2) Error of the trial court in denying motion for a new trial. There is no order in the record disposing of the motion for a new trial, and the questions in-

volved are covered by our disposition of the other points.

(3) Error in giving the following instruction:

“I instruct you that under the law, the father of a child has the right to maintain an action in damages for the death of his child, and in this connection I instruct you that if you find that the defendant Gregory, was negligent, by a fair preponderance of the evidence and then find that the infant was not contributorily negligent, then you should find for the plaintiff, and fix his damages in the value of the child’s services from the time of his death until he would have attained the age of majority, taken in connection with his prospects of life, less the costs of his support and maintenance, together with doctor’s bills, hospital and undertaker’s bills and cost of burial.”

And by this it is sought to bring up the question whether a cause of action was proven upon the principal amount of recovery, viz: the loss of decedent’s services during his minority, and in the same connection there is raised the question that the verdict is excessive.

The evidence shows disbursements for doctor’s bills, liability for a small hospital bill, and expenditures for funeral expenses, totaling about \$185. The evidence as to the loss which the respondent might suffer through failure to secure the services of his minor child during the latter’s minority was limited to the statement that the minor was seven years of age and a healthy boy. It is contended by appellant that, in the cases in which we have allowed recovery in this class of actions, there has been submitted proof in addition to the foregoing of the capacity of the minor, the situation of its parents, or something else to show its prospects in life, and appellant cites *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054; *Atrops*

Feb. 1922]

Opinion Per Hovey, J.

v. Costello, 8 Wash. 149, 35 Pac. 620; *Atkeson v. Jackson Estate*, 72 Wash. 233, 130 Pac. 102; *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492.

We are of the opinion that this question is not properly before us for the reason that, so far as the record here shows, this question was never called to the attention of the trial court. There was no motion for nonsuit, judgment *non obstante*, nor a directed verdict, and the written exception to the instruction appears to be the only manner in which appellant sought to raise the question, and it was not filed with the clerk until three days after the verdict was rendered, and so far as the record now shows, it was never called to the attention of the trial court.

Section 384, Rem. Code (P. C. § 7812), provides that the exceptions shall, if practicable, be made before the verdict is returned, and that the judge shall note the exceptions in the minutes of the trial or cause the same to be done.

In *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202, this section is held to be amended by subd. 4, Laws of 1909, p. 184 (Rem. Code, § 339; P. C. § 8504), to the extent that exceptions to instructions may be taken at any time before the motion for a new trial is heard, but the method of taking and preserving the same in the record of the case was held to be still governed by the former section.

It is a settled rule of decision in this court that questions not called to the attention of the trial court will not be considered upon the appeal. *Tacoma Grocery Co. v. Barlow*, 12 Wash. 21, 40 Pac. 380; *Weber v. Snohomish Shingle Co.*, 37 Wash. 576, 79 Pac. 1126; *Migge v. Northern Pac. R. Co.*, 75 Wash. 197, 134 Pac. 815. The latter case was one where error was predicated upon a verdict claimed to be excessive.

In view of the record, we do not feel called upon to pass upon the quantity of proof required.

The judgment appealed from is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16862. Department Two. February 24, 1922.]

In the Matter of the Estate of JOHN E. MAYNES.

THE CITY OF PHILADELPHIA *et al.*, Respondents, v.
THE STATE OF WASHINGTON, Appellant.¹

TAXATION (229)—INHERITANCE TAXES—EXEMPTIONS—BEQUESTS FOR CHARITABLE PURPOSES—STATUTES—CONSTRUCTION. A bequest for the establishment of a fund for "furnishing fuel in winter time to needy poor families" is one for a charitable purpose within Rem. Code, § 9199 as amended by Laws 1917, p. 597, defining the relief of "poor people" as a charitable purpose, and thus exempt under that statute from the levy of an inheritance tax.

CHARITIES—BEQUEST TO MUNICIPALITY. A bequest to a municipality of another state as trustee merely, for a charitable purpose, is a valid one, where there is nothing in its charter denying it power to act in such capacity.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 30, 1921, in favor of the plaintiff in probate proceedings, adjudging a bequest to be exempt from the payment of an inheritance tax, after a hearing before the court. Affirmed.

The Attorney General and Geo. G. Hannan, Assistant, for appellant.

E. R. York, for respondent.

HOVEY, J.—This is an appeal by the state from a judgment exempting a bequest from inheritance tax.

¹Reported in 204 Pac. 596.

Feb. 1922]

Opinion Per HOVEY, J.

Certain real estate in this state belonged to John Maynes, who was a resident of the city of Philadelphia and died there, leaving a will under which the city of Philadelphia was made residuary legatee under the following clause:

“All the balance or remainder absolutely and in fee simple unto the City of Philadelphia, in Trust, nevertheless, for the establishment of a fund, the income of which shall be applied to furnishing fuel in winter time to needy poor families, and I express the wish that no part of the income shall be expended as I have directed but shall be added to the principal until the entire capital and income shall make a total capital sum aggregating Two Hundred Thousand Dollars.”

By codicil it was directed that the capital sum should be increased to \$250,000. All legacies and charges against the estate have been taken care of out of other property and the property in this state falls wholly within this clause. The real estate has been sold under powers contained in the will, and the proceeds, amounting to \$15,711, are in the hands of E. R. York, as administrator with the will annexed, and have been ordered distributed to the residuary legatee.

Section 9199, Rem. Code, as amended by Laws of 1917, p. 597, is as follows:

“All bequests and devises of property within this state when the same is for one of the following charitable purposes, namely, the relief of the aged, indigent and poor people, maintenance of sick or maimed, the support or education of orphans or indigent children, *and all bequests and devises heretofore made to the State of Washington or to any county, city, school district or other municipal corporation therein for eleemosynary, charitable, educational or philanthropic purposes* shall be exempt from the payment of any inheritance tax, and any property in this state which has been devised or bequeathed for such purposes and upon which a state inheritance tax is claimed or is ow-

ing is hereby declared to be exempt from the payment for such tax, and the same is hereby remitted.”

The law as enacted in 1905 (Laws of 1905, p. 199) did not contain the portion italicized above, and this was added by the amendment of 1917.

It is contended by the state that our statute does not exempt this bequest for the reason that it is not a charitable purpose, but it seems to us quite plain that it comes within the words “poor people.”

It is next contended that, because of the exemption in favor of the municipalities within this state, the exemption will not apply in favor of a municipal corporation without the state. But this bequest is to the municipal corporation as trustee merely, and it is not necessary to pass upon the effect to be given to the amendment of the statute. It is a well recognized principle that bequests may be made to municipal corporations for charitable purposes unless there is something in the charter forbidding them to receive, and none is shown in this case. 11 C. J. 334. But, on the other hand, it is alleged in the petition that the power is possessed, and this fact is not denied in the answer of the state.

In our opinion, this bequest is clearly exempted from the tax by the provisions of our statute, and the judgment appealed from is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

Feb. 1922]

Opinion Per HOLCOMB, J.

[No. 16675. *En Banc*. February 24, 1922.]

ELLENSBURG ICE & COLD STORAGE COMPANY, *Appellant*,
v. THE CITY OF ELLENSBURG, *Respondent*.¹

WATERS AND WATER COURSES (42)—DIVERSION—PRIOR APPROPRIATION—REMEDIES—INJUNCTION. A prior appropriator of the waters of a stream is entitled to an injunction against appropriation by another, where the taking by the latter is not sufficiently complete and definite to afford a measurement of the damages suffered by the prior appropriator.

Appeal from a judgment of the superior court for Kittitas county, French, J., entered May 17, 1921, in favor of the defendant, dismissing an action for an injunction and for damages, tried to the court. Reversed.

Carroll B. Graves and *John H. McDaniels*, for appellant.

Ralph Kauffman, for respondent.

HOLCOMB, J.—This is an action against the respondent, praying for a perpetual injunction, and for damages caused by, and incident to, repeated past trespasses on the part of respondent in and to the waters of the Yakima river, appropriated by appellant and its predecessors.

The issues were presented by amended complaint, answer thereto, and a reply. Upon the trial of the case, counsel for appellant made an opening statement to the trial court of the facts, and upon the opening statement, respondent moved for judgment upon the pleadings and the opening statement.

The amended complaint, in substance, alleges an appropriation of water from the Yakima river in the year 1887 by the predecessors in interest of appellant, and the application of that water to the beneficial use

¹Reported in 204 Pac. 776.

of developing power for the operation of a flour mill, and that this appropriated right, by *mesne* conveyances, was conveyed to appellant, and that the waters so appropriated have been applied ever since 1887 to the use for which appropriated; and that the city, by repeated trespasses, has unlawfully interfered with appellant's rights, and threatens to continue so to do unless restrained, to the injury and damage of appellant. The prayer was for perpetual injunction, and for damages caused by, and incident to, past trespasses.

The answer admits that the city claims some right, title, interest and estate in and to the waters of the Yakima river adverse and superior to the rights of plaintiff, and alleges facts showing an intention to appropriate the waters of the Yakima river to a beneficial use, and an actual diversion thereof, and the application of the water so diverted to a beneficial use. There is no allegation of any taking or condemnation, formal or informal, of the private appropriated rights of appellant; nor is it claimed that the city ever had, or now has, an intent to condemn any right claimed or possessed by appellant. Neither is there any allegation that appellant is estopped by its acts, or has acquiesced in any of the acts of the city.

Appellant claims that, under the issues so framed, there is presented an ordinary case of a suit to determine and adjudicate the prior rights of appropriators from a stream. Respondent relies upon appropriation from the same stream.

From the allegations of the amended complaint, and the opening statement of counsel for appellant, it appears that appellant's canal is taken out on the east side or left bank of the river about four miles from Ellensburg. In 1903 the city dug a canal on the west side or right bank of the river, conducting the water

Feb. 1922]

Opinion Per HOLCOMB, J.

and running its canal for some distance to a power plant which was constructed and built later for the generating of electric power. Leaving the power plant, the water flows down a canal and into the Yakima river at a point below the intake of appellant's ditch, and on the west side of the river, so that a goodly portion of the river is taken up by respondent's canal and carried past appellant's intake, and then the water, after being used, again joins the flow of the river. Again, in about the year 1911 or 1912, the city enlarged its power canal, and enlarged and increased its use for electric power for the purpose of pumping water for its water system. In these years, for the first time, it installed a water system, the city having theretofore received its water supply from a private corporation.

The Yakima river is a stream of inconstant flow. During the spring and early summer months, when the lower snow fall is melting, the river runs a very strong and constant flow. In the late summer and fall months it gets very low. It is impossible to determine what the flow of the stream is going to be in a given season, for the reason that some seasons there is little snow in the mountains, and other seasons there is more. Appellant claims that it was impossible to determine whether the additional appropriations and use made by the city in 1911 and 1912 would injure it until about 1917, when it first discovered certainly that its flow of water was decreased by reason of the appropriation by the city, and this action was then begun. During the low water season the diversion by the city makes it impossible for the appellant to obtain enough water through its canal to operate its mill successfully, and is unable to know whether it will be able to manufacture its grain products. It is always a matter of con-

jecture and speculation as to whether there will be sufficient water at any season of low water for appellant to operate its mill. The city at all times had knowledge of the operations of appellant and of the operation of its canal. Appellant states that the object of this suit is, in the first instance, to obtain injunctive relief framed in any manner that the court may see fit by decree, so as to allow the city ample use of this water at times when there is sufficient for both, and at periods when the water is too low, that appellant is to have the use of that water as a prior right to that of respondent, when the respondent will be driven to the use of an auxiliary steam plant which it has.

The errors claimed by appellant are: that the court erred in holding that appellant was not entitled to injunctive relief, and rendering judgment in favor of respondent.

Respondent concedes most of the facts in the case, and concedes that appellant's appropriation of the water was first in time, and that if respondent were other than a public corporation using the waters in a public utility service, and having the right of eminent domain, appellant would be entitled to a decree quieting its title to such first right, and injunction in aid thereof; but claims that the taking by the city has been complete, it taking and using the entire flow of the water in low water season.

Appellant claims that the taking of the water by respondent has not been a complete taking, but is only a partial and intermittent taking and of uncertain quantities, so that there can be no measurement of the damages for the appropriation thereof until the city has defined and determined its use and right therein; that there should be a decree adjudicating the rights to the water according to the prior rights of the parties.

Feb. 1922]

Opinion Per HOLCOMB, J.

Respondent relies upon our cases: *Domrese v. Roslyn*, 89 Wash. 106, 154 Pac. 140; *Habermann v. Ellensburg Gas & Water Co.*, 100 Wash. 229, 170 Pac. 571; *Kakeldy v. Columbia & P. S. R. Co.*, 37 Wash. 675, 80 Pac. 205; and *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304, to the effect that injunction does not lie in such a case as this, and that appellant is relegated to its action in damages.

The *Habermann* case has some resemblance to this case. There a public service corporation supplying the city of Ellensburg with water completed its works and diverted the water before trial, and in an action to enjoin the diversion, in which no temporary injunction was issued, it was held that the action must fail and the riparian owners, although they brought suit about the time the work started, were relegated to their remedy by an action for damages. It will be observed that that case was one wherein the plaintiffs were riparian owners, and the diversion of the water by the defendant had been complete so that the damages were accrued and defined. This is a case where the plaintiff is a prior appropriator, and, as we view it, the taking is not complete and definite and should be defined by the appropriator.

This case is also to be distinguished from the *Domrese* and other like cases, because in the *Domrese* case there had been an actual taking of a riparian ownership in waters after the right of way had been granted to the city for its pipe line across the plaintiff's premises for the purpose of diverting the waters for a city water supply, and there were elements of acquiescence and waiver on the part of the riparian owner. In the statement which constitutes the facts before us in this case, there are no elements of acquiescence and waiver.

The situation in this case is more analogous to that shown in *Longmire v. Yakima Highlands Irrigation &*

Land Co., 95 Wash. 302, 163 Pac. 782, where the taking was not complete and the erection of the dam invaded no rights of the plaintiffs. Their rights would only be affected when the flow of the water was interfered with. True, in that case the taking was not complete because it would occur only in the future when the water was impounded. In this case the taking is not complete because it only occurs intermittently in each low water season. The erection of the city's diversion works invaded no right of appellant.

Under the facts in this case, and the rule laid down in the *Longmire* case, we are of the opinion that appellant shows a cause of action, and that it is entitled to an injunction, the injunction to be suspended for sixty days after the going down of the remittitur in this case, during which time the respondent may institute an action in eminent domain to condemn and appropriate the quantity of water under appellant's appropriation necessary for its use, and ascertain the damages.

Reversed, and remanded with instructions to proceed in conformity herewith.

PARKER, C. J., TOLMAN, FULLERTON, MAIN, MACKINTOSH, MITCHELL, and BRIDGES, JJ., concur.

Feb. 1922]

Syllabus.

[No. 17045. Department One. February 24, 1922.]

THURSTON COUNTY *et al.*, *Relators*, v. C. W. CLAUSEN,
*as State Auditor, Respondent.*¹

DRAINS (9)—ESTABLISHMENT—CONSOLIDATION OF DISTRICTS—RESOLUTION—DESCRIPTION OF LANDS INCLUDED. An order for the consolidation of two drainage districts, made pursuant to Laws 1917, p. 518, § 3, is sufficient where it describes all of the territory included in the original districts, although it does not exactly follow the exterior boundaries of the original districts, due to the fact that the inclusion of a quantity of acreage which had been incorporated in each of the original districts made the following of the original lines superfluous in describing the consolidated district.

SAME (11)—MODE AND PLAN OF CONSTRUCTION—HEARING. Under Laws 1917, pp. 518, 519, §§ 5, 6, providing that all provisions of law applicable to original drainage districts shall apply to a consolidated district, and that the rights and powers of such districts shall be possessed by the consolidated district, and that consolidation shall not affect the indebtedness of original districts nor the liability of the lands therein situated, there is no necessity for a public hearing before the county board for the purpose of adopting plans for the improvement of the consolidated district.

SAME (16-2)—ASSESSMENTS—PROCEEDINGS — ESTIMATES — COST OF IMPROVEMENT. Under Laws 1917, p. 523, § 16, providing that estimates of the cost of a proposed drainage improvement are "preliminary only and shall not be binding as a limit on the amount that may be expended in constructing such system," the fact that the actual cost of the improvement by a consolidated district is more than double the preliminary estimates made for the original districts is immaterial, where no objections have been raised by the landowners, and hence would not invalidate bonds issued to cover the cost.

SAME (5, 6)—ESTABLISHMENT—NOTICE OF HEARING—SUFFICIENCY. The objection that landowners in a consolidated drainage district have not had their day in court as to districts in which they were not property owners is without merit, where ample notice by publication and by posting in three public places in each of the districts was given, and the organization of each district, its plan for improvements, the estimated cost and the amount of benefits were all matters of public record.

¹Reported in 204 Pac. 787.

SAME (32-2)—ASSESSMENTS—POWER TO LEVY—PROPERTY LIABLE. It is within the power of the legislature to authorize drainage districts to make improvements at the expense of the property specially benefited.

SAME (2)—ESTABLISHMENT — CONSOLIDATION OF DISTRICTS — PURPOSE. Under the power conferred on the board of county commissioners by Laws 1917, p. 517, § 1, to order the consolidation of drainage districts when it "will result in economy of the maintenance of such districts," the board is authorized to order the construction of improvements by and on behalf of a consolidated district by taking up the work of its predecessors in whatever stage it may be.

Application filed in the supreme court January 16, 1922, for a writ of mandamus to compel the state auditor to accept certain drainage district bonds and issue a warrant in payment therefor. Granted.

William W. Manier and Roscoe R. Fullerton, for relators.

The Attorney General and Fred J. Cunningham, Assistant, for respondent.

Wm. B. Bridgman, *amicus curiae*.

TOLMAN, J.—This is an original proceeding by relators for the purpose of requiring respondent, as state auditor, to accept certain drainage district bonds and issue a warrant in payment therefor. The petition sets forth, among other things, the steps regularly taken under ch. 176 of the Laws of 1913, p. 611, and subsequent amendments thereto, by which drainage district No. 2 of Thurston county was established in January, 1919, and drainage district No. 4 of Thurston county was established in April, 1920. The improvements contemplated in district No. 2 were the drainage of the land on either side of the southerly end of Black lake by deepening and straightening the channel of Black river, which is the natural outlet of the lake and flows from the southerly end of the lake, emptying into the Chehalis river; and in district No. 4 it was pro-

Feb. 1922]

Opinion Per TOLMAN, J.

posed to drain lands on both sides of and lying northeasterly above the lake, by a ditch running northeasterly from the upper end of the lake to Percival creek, and thence into an arm of Puget Sound, near the city of Olympia. The boundaries of the two districts overlapped so that some 556 acres of land were in both districts, would presumably receive benefits from both districts, and be subject to assessments in both districts.

Prior to the organization of district No. 2, a report favorable to the proposed improvement had been made and filed by the county engineer, which included an itemized estimate of the cost of construction, amounting to \$15,763.08. The county board, in October, 1919, by resolution adopted after hearing, as provided by law, ordered that the assessments levied upon the land benefited should be paid in ten annual installments; that temporary warrants should be issued to pay the costs of construction as the work progressed, and that, when the work was completed, bonds should be issued and sold to take up the warrants. The board of supervisors of the district assumed charge of the work and expended approximately \$5,700 in its prosecution. In the meantime, upon a proper petition, due notice, and without objection, drainage district No. 4 was organized. The engineer's estimate of the cost of the work proposed to be done was fixed at \$18,050. Supervisors were elected but no construction work was begun, no expense was incurred except for organization expenses, and no bonds were authorized or issued.

In May, 1920, the supervisors of both improvement districts joined in a written request to the board of county commissioners of Thurston county, asking for a consolidation of the two districts. Thereupon the county board passed a resolution declaring its intention to order a consolidation, fixed a date for a hearing,

caused notice to be properly given as the statute directs, and a hearing to be had at a time and place specified in the notice. At such hearing there were no objections, and without opposition from any landowner, the county board passed a resolution consolidating the two districts into a consolidated district to be known as "Consolidated Drainage Improvement District No. 101 of Thurston County," and fixed the boundaries of such consolidated district so as to include all of the land theretofore embraced in the two original districts, but did not describe it according to the boundaries of the two original districts, since to do so would have been, in terms, to include twice the 556 acres common to both districts by reason of the overlapping of their boundaries.

The board of supervisors of the consolidated district determined that the improvements contemplated by each of the original districts should be constructed and completed as one unit, and under the supervision of the county commissioners let a contract for the work as a whole, and thereafter the board of county commissioners duly provided that the costs of the improvement should be paid by the property owners in ten annual installments; that temporary warrants should be issued, and that when the work was completed bonds of the consolidated district should be issued to cover the whole cost and take up the warrants; and still later an agreement was entered into between the county board and the state reclamation board (now the department of conservation and development) by which the state reclamation board agreed to purchase the bonds upon the completion of the work. No engineer's report or estimate was made or filed with the county board on behalf of the consolidated district, nor any public hearing had with reference to the improvement, other than the two reports made by the county engi-

Feb. 1922]

Opinion Per TOLMAN, J.

neer with reference to the two original districts, and the hearings had thereon, prior to the consolidation. The work has since been completed under contract and accepted by the county engineer, the costs of the improvement have been apportioned by the board of appraisers and assessments based thereon levied against the property benefited, all without contest or objection by any one, and the proceedings leading up to the levying of the assessments have all been regular and based upon due notice as required by statute. Nor has any appeal been taken from the order confirming the assessments. The total cost of the completed improvement for the consolidated district was \$80,613.19, including the \$5,700 expended by district No. 2 before the consolidation. Bonds for this amount have been duly issued and tendered to respondent as state auditor, and payment thereof demanded; but respondent has refused to accept the bonds and issue warrants in payment, upon the advice of the *Attorney General*.

We gather from his brief and argument that the *Attorney General's* objections to the bonds are as follows:

(1) That the resolution of the county board establishing the consolidated district should have described it by the exterior boundaries of both the original districts, even though by such description some 556 acres of land would have been twice described, and, in fact, such description, when stripped of surplusage, would have embraced exactly what is embraced by the description which was adopted.

(2) That though the plans for the improvement contemplated by the separate and original districts were properly adopted, still, notwithstanding that fact, upon the organization of the consolidated district there should have been a public hearing before the

county board to adopt the plans for the improvement in the consolidated district.

(3) That the county engineer's estimates of the cost of the drainage improvement of the two original districts totaled \$33,813.08, while the whole cost of the completed improvement of the consolidated district was \$80,613.19; that notwithstanding that § 16, Ch. 130, of the Laws of 1917, p. 523, provides that such estimates are "preliminary only and shall not be binding as a limit on the amount that may be expended in constructing such system," yet such provision is unconstitutional when applied to the present case, in that the landowners in each of the original districts had no notice of the hearing for the establishment of the other district, and no opportunity to be heard as to the plan of improvements in the other district, and hence no opportunity to be heard upon the plan of improvement adopted for the consolidated district, which included the plans of both of the original districts; hence they have not had their day in court.

(4) That the resolution of the county board authorizing the improvement on behalf of the consolidated district and awarding the contract for the construction of the same is void, for the reason that the statute does not authorize the construction of improvements on behalf of consolidated districts, but authorizes the consolidation of improvement districts for maintenance purposes only.

We will briefly consider these objections in the order in which they have been set forth.

In § 3 of the amended act (Laws of 1917, p. 518), after providing for a hearing upon the application for consolidation and any objections thereto which may be interposed, the county board is authorized to refuse to proceed further with the consolidation, "or may enter an order declaring any two or more of such districts

Feb. 1922]

Opinion Per TOLMAN, J.

consolidated, and that the territory included in such districts shall thereafter constitute and be known as 'Consolidated Drainage or Diking Improvement District No. — of — County,' giving to such consolidated district its number. . . ."

If the statute means what it says, and no reasons are advanced to cause us to think otherwise, then the only necessity is to so describe the consolidated district in the resolution as to cause it to include all of the territory included in the districts of which it is composed, and no more, and this can be done in any way or form which is definite and accurate. Since it is not contended that any of the territory of the two original districts has been omitted, or anything outside of that territory included, or that the description is in anywise indefinite or uncertain, we conclude that the description adopted by the county board was sufficient.

The second contention is as readily answered. Section 5 of the amended act (Laws of 1917, p. 518), in considerable detail, gives the board of supervisors of the consolidated district all of the rights and powers theretofore possessed by the supervisors of the original districts, provides that the indebtedness of the original districts and the liability of the lands situated therein shall not be affected by the consolidation, and § 6 (Laws of 1917, p. 519), reads:

"Whenever two or more districts have been consolidated all the provisions of law applicable to such districts prior to the consolidation shall apply to the consolidated district."

Hence, at whatever stage the consolidation takes place, it is plainly the legislative intent that there shall be no backward step taken. All that has been lawfully done remains legally binding and the consolidated district may go forward at once from the point where the original districts left off. It is not contended that

there was here any failure in this respect, or that every requirement of the statute has not been met, either before the consolidation by the original districts, or afterwards by the consolidated district.

The third objection is a somewhat more serious one. The combined estimates of the cost of the improvements in the two original districts made by the county engineer totaled less than \$34,000, while the work as prosecuted after the consolidation cost more than \$80,000. It is not shown, however, that the original plans were in anywise changed or departed from, and the record wholly fails to explain the discrepancy between the estimates and the cost. Were the question properly raised by one owning land subject to the assessment it would merit careful study, but the property owners have stood by and seen the contract let and the work performed without any protest; have, after due notice, failed to file a single objection to the assessment roll, and have permitted the assessments against their property to become final. Nor are they, or any of them, appearing in this action or asking any relief whatever. Having thus permitted their property to become irrevocably bound, we can only conclude that they have received their money's worth and are satisfied, and, since the act provides "that such estimate of the cost shall be held to be preliminary only, and shall not be binding as a limit to the amount that may be expended in constructing such system", there is nothing to be considered except the point raised by the *Attorney General, i. e.*, that the property owners have not had their day in court.

This contention will not bear analysis. The owners of property within the confines of each of the original districts had due notice under the statute, it is conceded, of everything necessary at the time each

Feb. 1922]

Opinion Per TOLMAN, J.

original district was organized and became finally and fully bound thereby, so that, had the original districts remained in being and carried out each its proposed plan, this question could not have been successfully raised. Being so bound, what effect had the consolidation upon them? It may be conceded that, if the consolidation had taken effect without notice to them, they would not have been bound thereby, but we find that the statute very fully and carefully provides that, when the petition for consolidation is presented to the county board, that body, if of the opinion that the proposed consolidation will result in economy of maintenance, shall, by resolution, declare an intention to order such consolidation, and shall fix a time and place for hearing objections thereto, which shall not be less than thirty nor more than sixty days thereafter, and notice of such hearing shall be given by publication for two successive weeks, and by posting in three public places in each of the districts affected. It being admitted that the statute was fully complied with, this would seem sufficient. The organization of each district, its plan for improvements, the estimate of the cost thereof, and the amount of benefits, and all other facts showing its status, were matters of public record, open to all; and with knowledge that the county board intended to order the consolidation unless objections were filed, it is inconceivable that the property owners would not inform themselves of the condition of the other district in which they had not theretofore been interested, unless, indeed, they were determined to trade "sight unseen", in which event, according to the universal custom, they would be entitled to no sympathy and no relief in any event. We are at a loss to see how the legislature could have more amply provided for a hearing upon the plan to be adopted

by the consolidated district, which, by virtue of the consolidation, comprised the plans of the several districts theretofore adopted. Nor can it be contended that the legislature exceeded its power in so providing: *Kuehl v. Edmonds*, 91 Wash. 195, 157 Pac. 850; *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502, 171 Pac. 539.

The fourth and last objection has its source, we think, in the language of the statute (Laws of 1917, p. 517, § 1), which reads:

“Whenever it shall appear to the board of county commissioners that the consolidation of two or more diking or drainage improvement districts established under the provisions of chapter 176 of the Laws of 1913 and acts amendatory thereof will result in economy of the maintenance of such districts, they shall by resolution declare their intention to order such consolidation. . . .”

We find no other reason mentioned in the statute for consolidation save only “economy of the maintenance”, as above stated, and have no hesitancy in holding that the intent of the legislature was to authorize consolidation for such purpose only; and presumably the consolidation here complained of was sought and obtained for that purpose only. But while authorized for the purpose of securing economy of the maintenance only, there is nothing in the statute which in anywise limits the time within which consolidation may be made. Presumably, in many cases, if not in all, when the plans of adjacent districts have been adopted, it can readily be determined from a study of the plans whether or not economy of maintenance can be effected by consolidation or otherwise, with substantially as much certainty as the same question can be determined after construction is fully completed. The very language of the statute contained in §§ 5 and

Feb. 1922]

Opinion Per **TOLMAN, J.**

6 of the amended act, to which we have heretofore referred, indicates the legislative intent that the consolidation may take place at any time after the original districts have been organized (economy of maintenance having been determined), and nowhere in the statute do we find anything indicating a contrary intention. Hence, assuming, as we are bound to do from the record before us, that the consolidation in this case was sought and obtained for the purpose of effecting "economy of the maintenance", and the statute conferring full power upon the consolidated district to take up the work of its predecessors in whatever stage it may then be, we cannot hold that a resolution by the board of county commissioners authorizing the construction of the improvement by and on behalf of the consolidated district is other than a proper, legal and binding order under the conditions shown in this record.

The peremptory writ of mandate will issue as prayed for.

PARKER, C. J., FULLEBTON, and BRIDGES, JJ., concur.

[No. 17095. Department One. February 25, 1922.]

THE STATE OF WASHINGTON, *on the Relation of F. B. Carpenter, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Otis W. Brinker, Judge*, Respondent.¹

CERTIORARI (6)—ADEQUACY OF REMEDY BY APPEAL. Certiorari to the supreme court will lie to review a judgment in mandamus directing the clerk of a school district to call an election, where an appeal would be inadequate because of the necessity of giving notice of election before an appeal could be heard.

ELECTIONS (46) — VOTES—CANVASS — OFFICERS — CUSTODY OF RETURNS. Laws 1921, p. 181, § 5, providing that election officers in school districts in class "A" counties and counties of the first class shall count the ballots and make return to the proper officers of the districts is not unworkable and uncertain because of failure to provide for the canvassing of votes by a canvassing board, since the count and canvass of votes by the precinct election officers and their return to the custody of the proper officers of the district establishes a complete record of the votes from which the result of the election can be determined by computation.

SAME (47)—CANVASS—POWERS OF OFFICERS. An officer or body authorized to canvass election returns performs only a ministerial duty in summing them up and declaring the result, unless the statute expressly gives such officers some additional power.

SAME (46). The board of directors of a school district being the custodian of its records and papers, a return by election precinct officers of votes cast in a school election in class "A" and first class counties should be deposited with the clerk of the school board, under Laws 1921, p. 179, which supersedes the provisions of the general school election law in those two classes of counties.

SAME (12)—ELECTION PRECINCTS—BOUNDARIES. The fact that boundaries of a school district are not coincident with boundaries of election districts as duly established in a county does not render the result of a school election uncertain, inasmuch as the qualification of the voter as a resident of the school district may be tested by the election officers.

SAME (31)—BALLOTS—STATEMENT OF QUESTIONS SUBMITTED. Under Laws 1921, p. 181, § 5, it is made the duty of the chairman of the board of county commissioners, the county auditor and the prose-

¹Reported in 204 Pac. 797.

Feb. 1922]

Opinion Per PARKER, C. J.

cuting attorney, to place upon the school election ballot in appropriate form, not only the question of officers, but also any other proposition which the officers of the district are authorized to submit to the voters, when advised in some appropriate official manner by the proper officers of the school district.

SAME (11)—SCHOOL ELECTIONS—NOTICE OF ELECTION. Under Laws 1921, p. 179, which supersedes the general school election law (Rem. Code, §§ 4657-4663) the clerks of school districts in class "A" counties and counties of the first class are neither required nor authorized to give notice of school elections, that duty being reposed in a board composed of the chairman of the board of county commissioners, the county auditor and the prosecuting attorney.

Certiorari to review a judgment of the superior court for King county, Brinker, J., entered February 11, 1922, granting a writ of mandamus to compel the relator to give and publish notice of a general school election. Reversed.

Malcolm Douglas and Arthur Schramm, Jr., for relator.

George F. Hannan, for respondent.

PARKER, C. J.—This is a certiorari proceeding in this court, in which the relator, F. B. Carpenter, as clerk of school district No. 183 of King county, seeks review and reversal of a judgment of the superior court for that county, which judgment awarded a writ of mandamus against him as clerk of that school district. It is conceded that the relator is entitled to have that judgment reviewed in this court by this proceeding, since an appeal therefrom would be inadequate because the controversy has to do with the giving of a notice of election which must necessarily occur before an appeal from the judgment could be heard in this court.

The relator has at all times been the duly qualified and acting clerk of school district No. 183 of King county, which is a school district of the third class,

having only one school house therein. King county is a class A county. The boundaries of the district are not coincident with the boundaries of duly established voting precincts; that is, some of the voting precincts lie partly within and partly without the district.

On February 7, 1922, W. L. Carpenter, an elector, property owner and taxpayer of the district, commenced an action in the superior court for King county, seeking a writ of mandamus against this relator, F. B. Carpenter, as clerk of the district, commanding him to give and publish notice of a general school election of the district, to be held at the school house therein on the first Saturday of March, 1922; or to give and publish notice of a general school election of the district, to be held at the school house therein on the first Tuesday after the first Monday of May, 1922. This action was instituted after demand made by W. L. Carpenter upon F. B. Carpenter, as clerk of the district, and refusal by the latter to comply therewith.

The controversy in the superior court in the mandamus proceeding was, as it is here, as to whether the provisions of chapter 61, Laws of 1921, p. 179, changing the time, place and manner of holding school and municipal elections, are valid and applicable with reference to school districts of the third class in class A counties and counties of the first class; or whether the general school law with reference to school elections, as it existed prior to the enactment of chapter 61, Laws of 1921, remains the controlling law as to school elections in such school districts. This question having been submitted to the superior court for final decision upon facts above noticed, judgment was rendered therein awarding a writ of mandamus against the relator, as clerk of the district, commanding him

Feb. 1922]

Opinion Per PARKER, C. J.

to give notice "of the regular annual school election at the school house in said district for the first Saturday in March, 1922." As evidencing the ground upon which the superior court rested its judgment, we note therein the following:

"It is now ordered and adjudged, that Chapter 61, Laws of 1921, are [is] inoperative and void insofar as it affects the aforementioned School District No. 183, and the election in said school district should be held under the laws that existed prior to the passage of said act."

The law of 1921 was enacted by the legislature of that year, manifestly for the purpose of having all elections in class A counties and counties of the first class, other than state, county and certain other specified elections, held under a unified system on the same day of the years within which such elections must be held. In so far as we need here notice the language of that law, it reads as follows:

"Sec. 2. That all city, town, township, school district, port district, park district, irrigation district, dike district, drainage district, drainage improvement district, diking improvement district, river improvement district, commercial waterway district, and all other municipal and district elections, whether general or special, and whether for the election of municipal or district officers or for the submission to the voters of any city, town, township or district of any question for their adoption or approval or rejection, shall be held in Class A counties and counties of the first class on the first Tuesday after the first Monday in May in the year in which they may be called: . . . (Laws of 1921, p. 179.)

"Sec. 5. It shall be the duty of the chairman of the board of county commissioners, the county auditor and the prosecuting attorney in Class A counties and counties of the first class in all city, town and district elections held under the provisions of this act to provide places for holding elections, to appoint the elec-

tion officers, to provide for their compensation, to provide ballot boxes and ballots or voting machines, poll books and tally sheets, and deliver them to the election officers at the polling places, to publish and post notices of calling such elections in the manner provided by law, and to apportion to each city, town or district its share of the expense of such election. (Laws of 1921, p. 181.)

“Sec. 6. The election officers herein above provided for shall conduct such elections and shall receive and deposit ballots cast thereat in the proper and respective ballot boxes and shall count said ballots and make return thereof to the proper officers of the respective cities, towns and districts in the manner provided by law: *Provided, however,* There shall be but one set of election officials in each precinct. (Laws of 1921, p. 181.)

“Sec. 7. At every election held under the provisions of this act, the polls shall be kept open from eight o'clock A. M. to eight o'clock P. M., and all qualified electors who shall be inside of the polling place at eight o'clock P. M. shall be allowed to cast their ballots at such election.” (Laws of 1921, p. 181.)

If these provisions of the 1921 law be held operative and controlling in the conduct of school elections in school districts of the third class, in class A counties and counties of the first class, they supersede the election provisions of the general school law, §§ 4657-4663, Rem. Code (P. C. §§ 5161-5167), relating to the manner and time of holding school elections and making returns and record thereof in districts of the third class, in class A counties and counties of the first class. The contention made in support of the superior court's judgment, here on review, is, speaking generally, that the law of 1921 is by its terms so uncertain and unworkable as to render it void and of no effect, in so far as it relates to elections in school districts of the third class in class A counties and counties of the first class.

Feb. 1922]

Opinion Per PARKER, C. J.

It is argued that the law is unworkable and uncertain in that it fails to provide any method for the canvassing of the votes of such school elections by any canvassing board or body, other than the counting and canvassing of the votes in each particular voting precinct of the district; that is, that there is not provided any one canvassing officer, board or body to declare the ultimate result of the election from the returns of the precinct election officers. It is true that this new law does not provide for so determining the ultimate result of the election, but this assumed defect and uncertainty in the law, we think, does not render an election held thereunder ineffectual, since it is provided therein that the election officers—manifestly meaning the precinct election officers—“shall count said ballots and make return thereof to the proper officers of the respective . . . districts”

Assuming for the present that it can be determined who are the “proper officers of the . . . districts” to whom the precinct election officers shall make return, it becomes at once apparent that the returns made by the election precinct officers will all find their way into the hands of some person or persons authorized to receive them, who will become the lawful custodian thereof. When all of the election returns of the particular district are so collected together in the lawful custody of the proper officer or officers of the district, there will then be in one place, manifestly accessible to all who are interested, a complete record, which by computation capable of being made by any one versed in the most elementary principles of arithmetic will show who has become the duly elected candidate for office, and also whether or not any proposition voted upon has been adopted or rejected by the voters. It seems to us that the mere fact that the

result of the election, both upon the question of choosing officers and upon the adoption or rejection of a submitted proposition, is not further evidenced by some official summing up of the votes *pro* and *con*, does not argue that any such election would fail to become effective. It, of course, must be conceded that, if the election machinery provided by statute were so defective that there would be no record of a counting or canvassing of the votes either by the precinct officers or by some central canvassing board, the election would fail of results, and that it would, under such circumstances, of course, not decide anything. But that is not this case. Under the law of 1921, the precinct election officers of each particular precinct "count", that is, "canvass", the votes cast in their precinct; and when that is done and the returns so made from each precinct are all brought together in one place in charge of the proper officer or officers of the district, the ultimate result of the election is rendered just as certain as if, after the lodging of the returns with such proper officer or officers, they were summed up and the total vote *pro* and *con* as to candidates and propositions declared by some central officer or body.

We recognize that it is usual for election laws to have such total result computed and declared by some central officer or body, but this we think is more a matter of convenience and efficiency than an absolute legal necessity. It is the fact of the holding of the election and making some official record thereof from which the result can certainly be determined that renders the election effective, rather than the canvassing of the vote or the determining of the result and making a record thereof in any particular manner. It is elementary law that an officer or body authorized to canvass election returns performs only a ministerial duty,

Feb. 1922]

Opinion Per PARKER, C. J.

which duty is the summing up of the returns as a mere matter of arithmetic and declaring the result of the election, unless the statute expressly gives such officer or board some additional power, which but few statutes do. 9 R. C. L. 1110; 20 C. J. 200; McCrary, Elections (4th ed.), § 261; Paine, Elections, § 603, etc.

Of course, a central canvassing body or officer must decide upon the genuineness and regularity of the returns, but that is done by reference to the face of the returns. No decisions have been called to our attention, nor have we been able to find any within the short time at our disposal, holding that the failure of a statute to provide for the canvass of election returns by some central canvassing officer or body will render the election ineffectual, when the votes have been counted and canvassed by the precinct election officers in their several precincts and return thereof made in compliance with law to some one central official custody, and such returns, by computation, will with certainty evidence the result of the election.

Now are we correct in assuming that there are some proper officers or officer of a school district of the third class to whom the election precinct officers provided for by the act of 1921 shall make their return of the result of the election in their respective precincts? This law does not in terms tell us what officers or officer of the district shall receive and have the custody of the returns; but it seems to us that, in view of the fact that the board of directors of the school district has general supervision over its affairs and custody of its property and papers, it, by its clerk, becomes the lawful custodian of all records, documents and papers belonging to the district, from which it follows that the election returns must be made to the district board of directors; that is, the returns shall be deposited

with the clerk of the district, which in effect places them in possession of the board. There may be some room for arguing that the returns should be made by the precinct election officers to the county superintendent of schools, in view of the provisions of § 4662, Rem. Code (P. C. § 5166), of the general school election law; since that section provides, among other things, that, following a school election held under that general law, "the clerk of the election shall forward the poll sheet thereof to the county superintendent, who shall preserve the same on file in his office"; but that, we think, is also superseded by the language of § 6 of the 1921 law above quoted, that the election officers, meaning, of course, the precinct election officers, shall "make return thereof to the proper officers of the respective . . . districts."

It is further argued that the law of 1921 is rendered uncertain and ineffectual, with reference to districts such as here involved, because of the fact that the boundaries of this particular district, as probably the boundaries of many others, are not coincident with the boundaries of election precincts as duly established within the county; but we do not think that makes the law unworkable. Of course, where an election precinct lies partly within and partly without the school district, only qualified voters who live within that portion of the election precinct within the district are qualified to vote at the school election. We fail to see why such qualification of the voter cannot be tested by the precinct election officers, as the law requires, as well as any other qualification of the voter may be tested as the law requires.

It is further argued that the law of 1921 is defective in that there is no method provided by which propositions to be voted upon by electors of the district at a

Feb. 1922]

Opinion Per PARKER, C. J.

particular election may be placed upon the ballot. It seems to us that a reading of § 5 of the act above quoted will at once render it plain that it becomes the duty of the general election board or body, consisting of the chairman of the county commissioners, the county auditor and the prosecuting attorney, to place upon the election ballot, in appropriate form, not only the question of the election of officers, but also any other proposition which the officers of the district are authorized to submit to the voters thereof. It is true that the chairman of the county board, the county auditor and the prosecuting attorney, as the board or body to provide for the elections, may not be obliged to take notice of what propositions the proper officer of the district may desire to submit to the voters of the district, without being advised in some appropriate official manner by the proper officers of the district; but when they are so officially advised, it seems plain that it would become their duty to put such question in appropriate form upon the ballot.

We are of the opinion that, while this law of 1921 is not as complete in details as is desirable, it is not so uncertain in the respects here noticed as to render it unworkable to the extent that the courts are privileged to hold it ineffectual and void for uncertainty with reference to school elections in school districts of the third class in class A counties and counties of the first class. It follows that, since the enactment of the 1921 law, the clerks of school districts of the third class, in class A counties and counties of the first class, are neither required nor authorized to give any notice for the holding of elections either upon the first Saturday of March or the first Tuesday after the first Monday of May; but that the notice for the election of such districts to be held in each year is to be given by the chair-

man of the board of county commissioners, the county auditor and the prosecuting attorney, under the law of 1921.

The judgment of the superior court awarding a writ of mandamus against the relator, F. B. Carpenter, as clerk of school district No. 183 of King county, is reversed, and the writ issued in pursuance of that judgment quashed and set aside.

MITCHELL, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 17036. Department Two. February 25, 1922.]

THE STATE OF WASHINGTON, *on the Relation of Grays Harbor Commercial Company, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, A. W. *Frater, Judge, et al., Defendants.*¹

CORPORATIONS (195)—ACTIONS—VENUE—"TRANSACTIONING BUSINESS." A business arrangement by a corporation, with an employment agency in another county to supply workmen from time to time when needed does not constitute the "transacting of business" by the corporation in that county, so as to render it subject to suit therein.

PROHIBITION (20)—GROUNDS—WANT OF JURISDICTION. Prohibition will lie to prevent a court from further proceeding in an action against a corporation which is brought in the wrong county.

CORPORATIONS (195)—VENUE (10, 16)—CHANGE—POWER OF COURT—ACTION AGAINST CORPORATION IN WRONG COUNTY. Where an action against a corporation is commenced in the wrong county, the court has no jurisdiction to make an order changing the venue to the proper county.

PARKER, C. J., dissents.

Application filed in the supreme court January 4, 1922, for a writ of prohibition to prohibit the superior court for King county, Frater, J., from further proceeding with a cause and to compel the granting of a

¹Reported in 204 Pac. 783.

Feb. 1922]

Opinion Per MACKINTOSH, J.

change of venue. Granted, except as to change of venue.

John C. Hogan, for plaintiff.

Gates & Helsell, for defendants.

MACKINTOSH, J.—One McVeety began an action in the superior court of King county against the Grays Harbor Commercial Company, a corporation, by service of a summons. The action was a transitory one, based on breach of a contract for the purchase of machinery. The matter is before this court on an application for a writ of prohibition, prohibiting the superior court of King county from proceeding farther with the action, and asking that that court be directed to grant a change of venue. The ground upon which the writ is asked is that the Grays Harbor Commercial Company, a foreign corporation, was not transacting business, nor did it transact any business at the time the cause of action arose, in King county; that it had no office in King county, nor any person residing in that county upon whom process could be served. Affidavits were presented on the question, an examination of which satisfies us that the relator's contention as to the facts is correct. From these affidavits it appears that the office which McVeety claimed was being conducted in King county by the relator was an employment office, run as a branch of the city and Federal employment agencies, and that the person in charge of that office was not an employee of the relator; that the only connection of that office with the relator was to direct men seeking work to the mill of the Grays Harbor Commercial Company, situated in Grays Harbor county, the relator keeping the agency informed as to what men it needed and the sort of work they would be required to do. For this service the relator paid a

consideration to the city and Federal employment agency in accordance with the terms of the contract between them.

This business arrangement did not constitute the city and Federal employment office an employee of the relator, nor did it constitute a transacting of business in King county, nor did it make the office of the employment agency an office of the relator for the transaction of business. The relator is merely one of the patrons of the employment agency, which was a free employment office maintained by the city of Seattle and the Federal government, the relationship of the employment office to the Grays Harbor Commercial Company being that of an independent contractor. See *State ex rel. Seattle & Lake etc. Co. v. Superior Court*, 86 Wash. 657, 150 Pac. 1149; *State ex rel. Wells Lumber Co. v. Superior Court*, 113 Wash. 77, 193 Pac. 229; *State ex rel. American Savings Bank etc. Co. v. Superior Court*, 116 Wash. 122, 198 Pac. 744.

The cases of *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984, and *Willapa Power Co. v. Public Service Commission*, 110 Wash. 193, 188 Pac. 464, are cases where the court sustained the presumption of jurisdiction, and do not conflict with the holdings of the cases just cited. The cases of *Strandall v. Alaska Lumber Co.*, 73 Wash. 67, 131 Pac. 211, and *Cohagen v. Big Bend Land Co.*, 109 Wash. 404, 186 Pac. 1070, decide that certain acts there done constituted the "transaction of business."

The question arises whether this court will do more than prohibit the lower court from proceeding, that is, whether it will compel the lower court to change the venue of the action. We have held in actions against individuals begun in the wrong county, where the defendants were entitled to a change of venue, that pro-

Feb. 1922]

Opinion Per MACKINTOSH, J.

hibition would lie to compel the transfer to the proper county. *State ex rel. Owen v. Superior Court*, 110 Wash. 49, 187 Pac. 708. But a distinction has been drawn between the right of change of venue which an individual has who is sued in the wrong county, and the right which a corporation has against which an action has been brought in the wrong county. This court in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670; *Hammel v. Fidelity Mutual Aid Ass'n*, 42 Wash. 448, 85 Pac. 35; *Whitman County v. United States Fidelity etc. Co.*, 49 Wash. 150, 94 Pac. 906; *Richman v. Wenaha Co.*, 74 Wash. 370, 133 Pac. 467; and *Davis-Kaser Co. v. Colonial etc. Ins. Co.*, 91 Wash. 383, 157 Pac. 870, has held that, where the action against a corporation has been commenced in the wrong county, the court of that county has acquired no jurisdiction of such corporation, and that being true, the court would not have jurisdiction to make an order changing the venue. As we said in *McMaster v. Advance Thresher Co.*, *supra*:

“It may be that there is no reason for this distinction, but it seems to have been the will of the legislature to create such a distinction, and the duty of the court is to construe the law as the intention seems reasonably to have been expressed by the legislature. This construction, it seems to us, cannot be avoided, and it follows that the court in Garfield county was without jurisdiction to pronounce judgment, and the judgment and all the proceedings in that court were without authority and void.”

In the discussion of that case the distinction is made between § 206, Rem. Code (P. C. § 8543), which relates to the venue of actions against private corporations, and the following sections, §§ 207 and 208, Rem. Code (P. C. § 8544), § 207 being the one which relates to venue in cases other than those against corporations, and § 208 relating to proceedings in such actions com-

menced in the wrong county, holding in the *McMaster* case, above, that §§ 207 and 208 relate to one subject which is entirely distinct and separate from that dealt with in § 206.

The court having no jurisdiction where an action has been begun against a corporation in the wrong county, may be prohibited from exercising jurisdiction, but this negatives the idea of its being allowed to grant a change of venue. No jurisdiction having been obtained over the corporation, the situation is the same as though no service had been made, and the court cannot send the case to another county, for there is no action pending which is subject to transfer.

In the case of *State ex rel. Wells Lumber Co. v. Superior Court, supra*, prohibition was asked to restrain the court from granting a change of venue in an action against a corporation which was found not to be properly sued in the county where the action was begun, and this court denied the writ, which, in effect, allowed the lower court to make the transfer. The question whether the court had jurisdiction to make the transfer was not raised in that action, it being tried purely upon the question of whether the facts showed that the corporation was properly suable. For that reason that case cannot be taken as authority for the proposition contrary to that which we have here announced as to the court's right to grant a change of venue where the action against a corporation has been begun in the wrong county.

The present action having been begun in the wrong county, the court of that county had no jurisdiction, and a writ of prohibition will lie to restrain it from proceeding further in the matter, but that portion of the application for the writ which relates to the change of venue must be denied. It is so ordered.

HOLCOMB, MITCHELL, and HOVEY, JJ., concur.

Feb. 1922] Dissenting Opinion Per PARKER, C. J.

PARKER, C. J. (dissenting in part)—I concur in the result announced by my brethren in the foregoing opinion, but dissent from one announced view of the law therein, touching the jurisdiction of the King county court over the person of the relator as defendant in the action in question. Relator, as the defendant in the case, voluntarily asked for a change of venue to the proper county, and thereby invoked the jurisdiction of the King county court to that extent; and the plaintiff in the case has, of course, by commencing the action in that court, invoked its jurisdiction for all purposes. This, to my mind, is plainly not a question of jurisdiction over the subject-matter of the action in question, but only a question of jurisdiction over the person of relator as the defendant in that action. If relator had voluntarily answered and gone to trial upon the merits, manifestly the jurisdiction of the King county court would have been complete, even though neither party had ever before been in, or done any business in, King county. The superior court of every county in the state of Washington has jurisdiction over the subject-matter of that action. This is true, because it is an action which might be tried in any superior court of the state, either by consent of the parties thereto, or by change of venue from a county in which it might have been properly commenced, upon proper showing under our general change-of-venue statute.

I assume that relator's appearance in the action was special in the sense that relator objected to the assuming of jurisdiction over its person by the King county court for the purpose of trying the case, or doing more than sending it to the superior court of a county which relator could have been by summons forced into; but relator's appearance was not special in the sense that the King county court is thereby prevented from lawfully doing the very thing relator asked it to do. I

agree that the superior court for King county should be prohibited from making any order in the case, other than the one relator asked for; and I do not seriously object to the refusal of this court, in this particular proceeding, to compel the King county court to send the case to another county; but I do dissent from the view of the law that the superior court for King county has not the power to send the case to the court of another county for want of jurisdiction over the person of relator. The plaintiff in the action may have the right to have the case not sent to another county; but if so, he can, by timely voluntary dismissal of his action, secure that right.

[No. 17033. Department Two. February 25, 1922.]

C. W. ANTILL, *Appellant*, v. LELA J. LORAH,
Respondent.¹

BROKERS (16)—COMPENSATION—PROCURING CAUSE OF SALE—EVIDENCE—SUFFICIENCY. A broker employed to procure a purchaser for the lease and furniture of an apartment house at a listed price, the owner retaining the right to make a sale direct and pay no commission if the broker was not the procuring cause, is not entitled to a commission where the owner enters into an agreement for a sale at a reduced price on condition that the sum is to be net to her, and in ignorance of the broker's having brought the sale to the attention of the customer, and the sale is never consummated.

Appeal from a judgment of the superior court for King county, Hill, J., entered May 21, 1921, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Walter B. Allen, for appellant.

Wingate & Benz, for respondent.

¹Reported in 204 Pac 795.

Feb. 1922]

Opinion Per HOVEY, J.

HOVEY, J.—Appellant sued respondent for a broker's commission and was denied recovery.

The undisputed facts are that respondent listed her property with several brokers, including appellant, retaining the right to make a sale direct and pay no commission if the broker was not the procuring cause. The property consisted of furniture in an apartment house and a lease, and the listed price was \$14,000. Respondent entered into a preliminary contract with a woman named Ashton for the sale of the property for \$13,400, with the express understanding, as respondent claims, that there was no broker's commission to pay and that the parties were dealing directly with each other. When the time came to close the deal, appellant appeared and claimed his commission. The sale was not consummated and the money deposited was returned, with the exception of \$25 retained by respondent by consent of the proposed purchaser to reimburse her for attorney's fees.

It is not disputed that the man who first talked to respondent first called himself Overfield, and that this man had inserted an advertisement for the purchase of a property similar to respondent's, and respondent claims that she answered this advertisement by letter. When Overfield visited respondent with the proposed purchaser, Mrs. Ashton, he represented himself as the husband of the latter and said that his name was Ashton. Appellant claims that the same man came to him in the first place, calling himself Lawrence, and that appellant first arranged for the sale, and both Overfield and Mrs. Ashton testified by deposition that appellant was the procuring cause of the proposed sale. On the trial, however, respondent produced a letter from Mrs. Ashton offering to refuse to testify for appellant if she would pay the sum of \$25.

We think it cannot be disputed that appellant never produced a purchaser ready to pay the full price of \$14,000, and we think the court was further justified from the testimony in concluding that, when respondent made the agreement for \$13,400, she had no knowledge that appellant claimed to have had anything to do with the sale, and that she made it upon the express understanding and condition that she was to receive this sum net to her.

It is a well settled principle of law that, in order for the broker to recover, one of two things must occur; either he must produce a purchaser able and willing to buy at the price for which the property is listed, or he must have been the procuring cause of a sale which is consummated, even though the parties may decide to vary the terms. 9 C. J. 587, 603. We think the trial court rightly concluded in this case that appellant had done neither.

The judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ.,
concur.

[No. 16849. Department Two. February 25, 1922.]

JOHN W. STEVENSON *et al.*, Appellants, v. MACCALLUM-DONAHOE FINANCE COMPANY, Respondent.¹

PRINCIPAL AND AGENT (18)—CONVERSION BY AGENT—LIABILITY TO PRINCIPAL—EFFECT OF CONDITIONAL BILL OF SALE. Where an automobile is placed in the hands of an agent to sell for cash, and the agent sells to a third person on terms by which he secures the full amount in cash, though the transaction embraces a conditional sale contract which is made out in the name of a finance company engaged in advancing money to the agent on such sales, the owner has no recourse against the finance company, his remedy being against his agent.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 2, 1921, upon findings in favor of the defendant, in an action for conversion, tried to the court. Affirmed.

Arthur Remington and *R. S. Holt*, for appellants.

George L. Spirk and *C. E. Stevens*, for respondent.

HOVEY, J.—Appellants placed an automobile in the hands of the Broadway Motor Company of Tacoma with instructions to sell the same for \$800 cash. The Broadway Motor Company sold the car to a man named Hall, taking in exchange a Ford car at a valuation of \$300, \$80 in cash, and the balance was covered by a conditional sale contract. Respondent makes a business of financing sales of automobiles, and the conditional sale contract from Hall was made out in its favor and the respondent paid to the Broadway Motor Company \$765, so that the Broadway Motor Company received in excess of \$800 in cash on the sale of the original car. At the time this transaction was consummated, the Broadway Motor Company was in

¹Reported in 204 Pac. 775.

active business, but subsequently it failed and appellant never received any payment for the car thus placed with it.

The appellants sued respondent, alleging conversion of appellants' car, and predicate their case upon the decision in *Lyon v. Nourse*, 104 Wash. 309, 176 Pac. 359. We fail to see how that case has any application to the present one. In that case it was held that a conditional bill of sale executed by one who never had title to the property is not good security, but the position of respondent with reference to the people to whom the car was sold has nothing to do with the status of appellant in this case. The appellant made the Broadway Motor Company its agent to sell the car. Assuming that respondent and Hall were bound by the limitations in the agency contract to a sale for cash, the agent received the full cash price for the car, and thereafter appellant's remedy is against his agent.

The judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

Feb. 1922]

Statement of Case.

[No. 16805. Department One. February 27, 1922.]

HENRY J. GUNNING, *Respondent*, v. JOHN H. MULLER
et al., *Appellants*.¹

BROKERS (18)—COMPENSATION—PERFORMANCE OF CONTRACT—NEGOTIATIONS THROUGH OTHER AGENTS. Where property listed with a real estate broker for sale under an exclusive agency contract is sold by the owner through another agent while the contract is still in force, the broker is entitled to his commission.

SAME (3, 14)—EMPLOYMENT—DURATION—PERFORMANCE WITHIN TIME SPECIFIED—CONSTRUCTION OF CONTRACT. A broker's contract fixing the price of property and providing for payment of "balance this fall" was not a limitation on the time of continuance of the contract, in view of an express provision therein that it was to run "for the period of sixty days from date hereof and hereafter until withdrawal by ten days' written notice."

SAME (3, 14). An exclusive brokerage contract granted "until withdrawal by ten days' written notice" is not invalid as extending over an indefinite or unreasonable time, inasmuch as it is easily revocable by written notice under the terms of the contract.

SAME (9)—EMPLOYMENT OF BROKER—CONTRACT—CONSIDERATION. A contract agreeing to pay a broker a commission in consideration of services to be performed in endeavoring to effect a sale of the owner's property, cannot be said to be without consideration on the broker's part where he did perform services by devoting considerable time and expense in trying to sell the property to a number of persons, including those who finally purchased it.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 11, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover a broker's commission. Affirmed.

Allen, Winston & Allen, for appellants.

Fred B. Morrill, for respondent.

¹Reported in 204 Pac. 779.

MITCHELL, J.—Respondent sued for a broker's commission and recovered judgment. There was a contract between the parties, as follows:

“April 23, 1919.

“To Henry J. Gunning:

“In consideration of the services to be performed by you in endeavoring to effect a sale of the following described property, viz.: 711 acres adjoining the town of Harrington on the south, N $\frac{1}{2}$ Sec. 27 NE $\frac{1}{4}$ Sec. 28—SE $\frac{1}{4}$ —Sec. 22—S $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. 22, all in T 23 N Range 36 E.

“I do hereby give and grant unto you for the period of 60 days from date hereof and hereafter until withdrawal by ten days' written notice the exclusive right to sell said property, and I agree to convey the same or cause the same to be conveyed by good and sufficient warranty deed to the person or persons designated by you. The price of said property to be \$36,000 and upon the following terms:

“Parties to assume mortgage of \$12,000 at 6% interest, \$5,000 cash, balance this fall. One-third of crop goes with place. Fall payment to be made before the 1-3 of crop is sold.

“I further agree in case of the sale to furnish an abstract of title to said property, duly certified to date by a competent abstractor, and to pay you a commission of \$1,500 per cent of the purchase price.

Address.....

“John H. Muller, Owner.

“Theresia Muller.”

Subsequent to the making of the contract, and after the respondent had given considerable time and effort towards making a sale of the property, it was sold through another agent of the appellants (appointed after the date of the contract with respondent) to parties with whom the respondent had already attempted to make a sale.

Feb. 1922]

Opinion Per MITCHELL, J.

The case is presented here by the appellants from three view points:

(1) It is argued that the respondent did not produce a purchaser able and willing to buy upon the terms specified in the contract, since it was shown that the purchasers were able to buy only after a loan was made to them by the second broker; that the appellants acted in good faith and did pay a commission to the second agent; and that this is not a case of a purchaser going behind an agent to save a commission. None or all of these facts or circumstances are sufficient to avoid liability. The contract was still in force at the time of the sale by the appellants through their second agent. It was an exclusive agency contract. The situation was similar in this respect to those in the cases of *Brownell v. Hanson*, 109 Wash. 447, 186 Pac. 873, and *Miller v. Brown*, 115 Wash. 177, 196 Pac. 573, in each of which the broker prevailed. See, also, C. J. vol. 9 (Brokers), p. 622; R. C. L., vol. 4 (Brokers), § 50, p. 318.

(2) It is contended that the respondent is not entitled to a recovery because the contract provided the "balance" of the purchase price was to be paid in the fall (1919), whereas the deeds by which the appellants conveyed the property were not delivered until about December 6, 1919. In the first place, while it is true the deeds were not delivered to the purchaser until about December 6, 1919, they were executed by the appellants on October 16, 1919, which was about, or shortly after, the time the purchasers agreed to take the property. The delay thereafter before the delivery of the deeds seems to have been necessary to procure a release of an outstanding mortgage on the property, to meet the final understanding of the parties to the sale. But, further, the contract with the respondent,

considered altogether, shows that the words relied on by the appellants, "balance this fall," relate to the terms or price, and not to the limitation of time for the continuance of the contract. Such is the particular and immediate setting of those words, while the dominating and controlling provision as to the time the contract of agency should continue is "for the period of sixty days from date hereof and hereafter until withdrawal by ten days' written notice." No notice of cancellation or withdrawal of the contract was ever given, therefore it was in force at the time of the sale. Nor is there any objection to the contract that it may be considered as extending over an indefinite or unreasonable length of time, for as was said in *Brownell v. Hanson, supra*, of a similar provision, "The agency could easily be revoked at any time, either at or after the fixed period had expired, by written notice, as the contract provided."

(3) It is claimed the respondent was not obligated to do anything, and that therefore the contract was unilateral and that no recovery may be had by him. We need not consider what respondent's rights would have been had he done nothing under the contract. The promise of the appellants was made "in consideration of services to be performed" by the respondent. The undisputed evidence is that he did perform services and devoted considerable time and expense in trying to sell the property to a number of persons, including those who finally purchased it. Certainly, after that was done, it cannot be successfully claimed that there was any lack of consideration for the obligation sought to be enforced by this action. *Braniff v. Baier*, 101 Kan. 117, 165 Pac. 816, L. R. A. 1917E 1036; *Metcalf v. Kent*, 104 Iowa 487, 73 N. W. 1037; *Lapham v. Flint*, 86 Minn. 376, 90 N. W. 780; *Axe v. Tolbert*,

Feb. 1922]

Opinion Per MITCHELL, J.

179 Mich. 556, 146 N. W. 418; R. C. L., vol. 4, § 56, p. 318.

Affirmed.

PARKER, C. J., FULLETON, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 16735. Department One. February 27, 1922.]

J. H. RAFFERTY, *Appellant*, v. GEORGE A. GASTON,
Individually and as Administrator etc.,
Respondent.¹

VENDOR AND PURCHASER (48)—CONTRACT—FORFEITURE—DEFAULT BY VENDEE—WAIVER. A purchaser of real property under an executory contract making time of its essence, who defaults in payments without the acquiescence of the vendor, cannot recover the amount paid on the contract, though the vendor, subsequent to the default, has sold the property to another.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered August 9, 1921, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

James A. Dougan, for appellant.

Vance & Christensen, for respondent.

MITCHELL, J.—On July 29, 1918, George Gaston and Belle Gaston (the latter having died since the commencement of this action), husband and wife, as owners, entered into a written contract with J. H. Rafferty of Seattle, Washington, for the sale to him of certain real property in Thurston county, on the installment plan. On October 16, 1920, Gaston and wife sold and conveyed the property to a third party, without the

¹Reported in 204 Pac. 595.

knowledge or consent of Rafferty. Thereafter this suit was instituted by him to recover the amount of certain payments he had made on the contract. Upon issues joined, the case was tried, resulting in a judgment in favor of the defendants, from which this appeal has been taken.

The terms of the sale consisted of a cash payment and the balance was to be paid in monthly installments, with interest payable monthly on the unpaid installments; all payments to be made at the home of the vendor in Olympia. The vendee agreed to pay all taxes that became due on the property after the date of the contract. Time was made of the essence of the contract, and in case of failure to make payments as specified, it was provided that all payments already made should be forfeited as liquidated damages and that the contract should become null and void at the option of the vendors, who should have the right to reenter and take possession of the premises.

It was alleged in the complaint that the plaintiff was at no time in default in making his payments under the terms and conditions of the contract. The evidence shows the appellant made payment from time to time after the initial cash payment. In his brief, counsel for the appellant argues that "Mr. Rafferty paid long in advance of any amount that he might owe on this contract, and made the last payment in September, 1919, the last payment being in the sum of \$190. The contract did not call for more than \$25 per month." He had the privilege and at times did pay more than \$25. The trial court found, however, and we think correctly so, that the last payment, together with all prior ones, became used up, so that on July 29, 1920, appellant was in arrears in his monthly payments and interest in the sum of \$110. Further, and somewhat inconsistently, appellant contends that because there were

Feb. 1922]

Opinion Per MITCHELL, J.

some months, prior to the last payment, in which no payments were made, that therefore there had been a waiver of the terms of the contract in respect to time by the respondents, and that they are estopped from their claim of forfeiture. But there is no such allegation in the pleadings, and, besides, it is manifest that the payments made, including the last one, were more than equal to \$25 per month at the time of payments and were considered by both parties as "payments in advance," and can in no way be treated as extending leniency, or to effect the waiver of the terms of the contract respecting default and forfeiture.

The taxes due on the property in 1919 and 1920 were neglected until August 2, 1920, when they, with accumulated interest, were paid by the respondents.

Reliance is had by the appellant upon a provision in the contract, as follows: "In case J. H. Rafferty should become unable to make monthly payments as above agreed, an extension of two years will be allowed, but the interest is to be kept up." No extension was asked for, nor was any given, and if it be argued that the language employed should be considered self-executing so as to prevent a forfeiture, yet there is the exception of "interest" which "is to be kept up," an obligation wholly neglected by the appellant for all time subsequent to March, 1920.

The appellant never took possession of the property, but continued to live in Seattle, his address being unknown to respondents, who, having heard nothing from him after the payment in September, 1919, sold the property to another in October, 1920, as already stated.

A purchaser under an executory contract to purchase real property, in default in making his payments, without the consent or acquiescence of the vendor, such as is the case here, cannot recover of the latter the amount he has paid on the contract, time being of the

essence of the contract; and the fact that the vendor, subsequent to the default, has sold the property to another does not change the rule.

Affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ.,
concur.

[No. 16477. Department One. March 2, 1922.]

FRANK F. SAVAGE *et al.*, Respondents, v. D. P. DONOVAN
et al., Appellants.¹

MASTER AND SERVANT (174, 182)—INJURY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. The owner of an automobile is not liable for injury to a person caused by the negligence of one driving the car when the latter is not using it at the time in the employment, or upon the business, of the owner, but on business or pleasure of his own without any reference to the business of the owner; and the presumption that he was using it in the business of the owner is rebutted, as a matter of law, where a friend of the owner volunteered to take the car back to the garage, but instead of doing so drove about for his own pleasure.

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered February 2, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages sustained in an automobile collision. Reversed.

Merritt, Lantry & Merritt, for appellants.

Crandell & Crandell, for respondents.

MITCHELL, J.—This action was brought by Mr. and Mrs. Frank F. Savage against Mr. and Mrs. D. P. Donovan to recover for personal injuries and damage to their automobile, occasioned in a collision with an automobile belonging to the defendants. It was alleged the collision occurred because of the negligence of the

¹Reported in 204 Pac. 805.

Mar. 1922]

Opinion Per MITCHELL, J.

driver of the Donovan car. The verdict and judgment were for the plaintiffs. The defendants have appealed.

On the appeal, the negligence of the driver of the Donovan car is not questioned or denied. The appellants rely for a reversal upon the contention that the evidence fails to show any liability against them, a claim seasonably insisted upon at the trial by motions challenging the sufficiency of the evidence and for a directed verdict in their favor.

The accident happened on a street in the city of Spokane. The appellants lived at the Helen Apartments, on Adams street, and kept their car at a public garage on First avenue, three blocks north of the Helen Apartments and about two hundred feet west of the intersection of Adams street and First avenue. It appears that W. B. Johnson and wife were friends of the Donovan family, and that on the day of the accident, at the request of Mrs. Donovan, Mr. Johnson got the car from the garage, whereupon Mrs. Donovan, her two daughters, and Mr. and Mrs. Johnson used the car in a drive about and beyond the city for several hours, returning in the afternoon. Upon returning to the Donovan home, the undisputed evidence of Mrs. Donovan shows that Mr. Johnson said: "Mrs. Donovan, I will take the car back," to which she answered: "All right, put it in the garage," and his testimony was that, upon leaving the Helen Apartments, he was to take the car to the garage. Mrs. Johnson stopped for a short while with Mrs. Donovan and then returned to her home. Upon leaving his wife and the Donovans at the home of the latter, Johnson proceeded in the car alone north on Adams street to First avenue, and instead of going to the garage (two hundred feet west) he traveled east five blocks, thence north on Post street about two blocks and parked the car across the street from the Whitten Block, in which the Johnsons resided,

where it remained for an hour or an hour and a half, during which time, as he testified, he "just walked around town." At the time of the trial, some two years after the accident, he didn't remember any particular place he was aiming to go to nor any place visited by him, other than a soda fountain nearby, and that he was not engaged in any business of any kind for either Mr. or Mrs. Donovan. Upon resuming his drive, instead of going back towards the garage, he went further north to Riverside avenue, thence west and southwesterly along that avenue to a point near but still north of the garage, where the collision complained of happened. It appears that, on two or three prior occasions, Mr. Johnson, with some member of the Donovan family, or alone, but at the request of the latter, had taken the car from the garage to be used by himself and wife and the Donovans, upon invitations of the latter to join them in a ride.

Upon these facts, we think the contention of appellants that, at the time of the collision, Johnson was outside and beyond the scope of his employment or service for the Donovans; that he was acting without authority from them and doing nothing to further their business, and that it must be so decided as a matter of law, will have to be sustained. We have held that, when it is shown the vehicle doing the damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the vehicle was then in the possession of the owner, and that whoever was driving it was doing so for the owner. *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59; *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165. The presumption, however, is a rebuttable one and exists only so long as there is no substantial evidence to the contrary. *Birch v. Abercrombie*, and *Ludberg v. Barghoorn*, *supra*; *Babbitt*

Mar. 1922]

Opinion Per MITCHELL, J.

v. Seattle School District No. 1, 100 Wash. 392, 170 Pac. 1020.

That such substantial and conclusive evidence was given in this case, we think is beyond successful dispute. It is argued by the respondent, however, that "Johnson testified that he had taken the car downtown, had parked it for some time, and was then returning to the Helen Apartments, where the Donovans lived at the time, so that there is not the clear and direct evidence that the agent, Johnson, was acting beyond the scope of his employment in the premises." And it is contended that this of itself was enough to take the case to the jury. But we do not so understand the proof. It refers to what he said of his conduct upon leaving the place at which he had parked the car, and is as follows:

"Q. And where did you start to then? A. Well, I started back up to the apartment. Q. Going to take the car up to the apartment? A. Well, that is where the folks was, and sometimes I would drive back up there. Q. Well, when you left the Helen Apartments, where did you start to take the car then? A. I started to take it to the garage."

Now it seems to be clear that the testimony about driving back up to the apartments shows he was not in the service of the Donovans, and was suggested or thought of in connection with his conduct at some prior time while manifestly acting under a self-imposed license to do as he pleased with the car while engaged in his own pleasure, rather than as agent for or engaged in the service of the Donovans. The question here is what was he doing or directed to do on this occasion. Both he and Mrs. Donovan say he was to take the car back to the garage from the Helen Apartments. There is no other testimony. That was his only commission or authority. After starting upon

that service and from a point close to the garage, he made a marked and radical deviation to other parts of the city, where he remained more than an hour engaged in his own pleasure and pastime. How much out of the way may one go and how much time may he spend, if any, not in the master's service, and yet the master be held liable? In cases of this general kind a deviation in the line of travel is often troublesome in the determination of essential and ultimate facts, but never so if it be true, as here, that the deviation is marked and continuous and in no way called for in the execution of the master's business, but indulged in only for the personal pleasure of the servant.

Upon consideration of the whole case, we adopt the reasons and reach the same conclusion expressed in the case of *Ludberg v. Barghoorn*, *supra*, as follows:

“But where upon the defense it is shown conclusively and without any substantial dispute that the automobile was not being used at the time of the injury in the defendant's employment or upon his business, and was being used by some other person on business of his own and without any reference to the business of the owner, it becomes the duty of the court to direct the judgment under Rem. & Bal. Code, § 340.”

Reversed, with directions to the lower court to enter a judgment of nonsuit and dismissal of the action.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

Mar. 1922]

Opinion Per BRIDGES, J.

[No. 16698. Department One. March 3, 1922.]

C. C. ROWELL *et al.*, Respondents, v. ELDRIDGE BUICK
COMPANY, Appellant.¹

TRIAL (97)—INSTRUCTIONS—MATTERS NOT SUSTAINED BY EVIDENCE. In an action for personal injuries resulting from being struck by an automobile on alighting from a street car, it was error for the court to instruct the jury respecting provisions of an ordinance covering safety zones for street car passengers, where such ordinance was not in effect at the time of the accident.

APPEAL (386)—REVIEW—RIGHT TO ALLEGE ERROR—ADMISSIONS IN ANSWER. The appellate court cannot disregard a matter not presented to it until the filing of a reply brief, where the record shows it had been raised by objection in the trial court.

PLEADING (56)—ANSWER—ADMISSIONS. Where an ordinance not in existence at the time of an accident is pleaded as a fact, an answer admitting the passage of such ordinance as of a date subsequent to the accident, does not preclude the right to raise the objection that it was non-existent when the accident occurred.

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered April 14, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian struck by an automobile. Reversed.

O. C. Moore, for appellant.

W. H. Plummer and *J. D. Campbell*, for respondents.

BRIDGES, J.—By this action the plaintiff sought to recover damages because of personal injuries received by her, in the city of Spokane, on the 3d of June, 1920. She claimed that, as she was alighting from a street car, defendant's automobile, while being driven carelessly and in violation of certain ordinances of the city of Spokane struck and greatly injured her. The case was tried by a jury, and there was a verdict in favor of the plaintiff. The defendant has appealed from the judgment entered thereon.

¹Reported in 204 Pac. 772.

The court told the jury that the city of Spokane had an ordinance with reference to the creation of safety zones—that is, places marked out on certain streets where persons might take and leave street cars in comparative safety. The jury was fully instructed regarding these zones and the rights they gave pedestrians within them, and the duties imposed on automobiles in approaching or being within them. This safety zone ordinance very minutely governed the movements of automobiles within or approaching the zones. For our present purposes, it will not be necessary to give these instructions in greater detail.

The appellant contends that, at the time of the injury to the respondent, there was no ordinance whatsoever in the city of Spokane creating, or attempting to create and regulate, safety zones in that city, and consequently the court erred in giving its “safety zone” instructions.

The complaint plead ordinance number C-1832, and several amendments thereto, including ordinance C-2565, passed July 12, 1920. There was no provision in any of the ordinances of the city of Spokane concerning safety zones until the passage of ordinance C-2565, on July 12, 1920. It will be noted that that ordinance did not go into effect for more than a month after the injury sued for. Section 291, Rem. Code (P. C. § 8376), provides that, “In pleading any ordinance of a city or town in this state, it shall be sufficient to state the title of such ordinance and the date of its passage, whereupon the court shall take judicial knowledge of the existence of such ordinance and the tenor and effect thereof.” We have, then, a situation where the court has instructed the jury concerning an ordinance which was not in existence at the time of the injury sued for.

The respondent contends that this point was not

Mar. 1922]

Opinion Per BRIDGES, J.

raised in the lower court, and was not raised in this court until the reply brief, and therefore we should not listen to the appellant's argument in this regard. But the question is directly raised here and we cannot close our eyes to it. The mere fact that it was not raised until the reply brief will not justify us in disregarding it. It may be that it was not argued to the lower court, but that it was raised in that court there can be little question. The exceptions taken by the defendant to the instructions with reference to the safety zones stated that "there is no evidence in the case of the existence of a safety zone at the place of the accident, or of any legal authority for the establishing of such a zone."

Respondent, in its supplemental brief, says that the appellant is not now in position to raise this question because the complaint alleged these various ordinances, including the one passed on July 12, 1920, and which provided for safety zones, and stated that such ordinances contained, among other things, the provision with reference to safety zones, and which provisions were copied into the complaint and made a part of it, and that the answer admitted these allegations of the complaint. The pleadings of the defendant amounted to nothing more than that it admitted the ordinance passed July 12, 1920, contained provisions with reference to safety zones. This was an admission of an undisputed fact, but the answer did not admit that there was in effect at the time of the injury to the respondent any ordinance whatsoever creating, or with reference to, safety zones.

Because of the error pointed out, we cannot do otherwise than reverse the case and remand it for a new trial. It is so ordered.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16681. Department One. January 11, 1922.]

MARY HOWE COLEMAN, *by her Guardian ad Litem E. D. Stoner,*
Respondent, v. WILLIAM T. COLEMAN *et al.*, *Appellants*.¹

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered December 17, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for alienation of affections. Affirmed.

H. J. Snively, for appellants.

Grady, Shumate & Velikanje, for respondent.

PER CURIAM.—The plaintiff is the wife of W. L. Coleman, who is the son of the defendants. She alleged that the defendants unlawfully alienated the affections of her husband and induced him to refuse to live with her or support her, and sought damages. The defendants denied all of these charges against them. The case was tried by the court and a jury. Defendants' motions for nonsuit, for directed verdict, and for judgment notwithstanding the verdict, were denied by the trial court, and defendants have appealed from a judgment entered on the verdict in favor of the plaintiff.

The only question argued here is whether the testimony was sufficient to justify the court in submitting it to the jury. The case has been ably briefed and argued, and we have read and considered the testimony with great care. There was a decided and irreconcilable conflict between the evidence of the respondent and that of appellants. The facts are entirely personal to the case, and no public good can be achieved by giving them. No persons other than the parties to this action are, or can be, interested in them. Many of them are such that they ought not to be here detailed unless it is necessary so to do in order to make a proper decision of the case, and this necessity does not exist. We have concluded, therefore, to say nothing more than that we are fully convinced that the respondent's testimony was such as to justify the trial court in submitting the case to the jury, and denying the various motions of the appellants.

The judgment is affirmed.

¹Reported in 203 Pac. 39.

Mar. 1922]

Opinion Per Curiam.

[Nos. 16717, 16718, 16719. Department One. January 23, 1922.]

W. E. ROTHGEB *et al.*, *Respondents*, v. IVAN CUNNINGHAM, *Appellant*.
JACOB T. DAVIS, *Respondent*, v. IVAN CUNNINGHAM, *Appellant*.
BEN W. ASHLEY *et al.*, *Respondents*, v. IVAN
CUNNINGHAM, *Appellant*.¹

Appeal from judgments of the superior court for Benton county, Truax, J., entered January 26, 1921, in favor of the plaintiffs, in actions to quiet title, tried to the court. Affirmed.

Cordiner & Cordiner, for appellant.

Stephen E. Chaffee and *R. John Lichty*, for respondents.

PER CURIAM.—The controlling facts in these cases, numbers 16717, 16718 and 16719, are essentially the same as the facts in the cases of Birge and others against Cunningham, *ante* p. 458, 203 Pac. 954. For the reasons stated in the opinion in those cases, the judgment in each of these cases is affirmed.

[No. 16517. Department One. March 2, 1922.]

MARY MATSON, *Respondent*, v. D. P. DONOVAN *et al.*, *Appellants*.²

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered February 2, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Merritt, Lantry & Merritt, for appellants.

Crandell & Crandell, for respondent.

PER CURIAM.—This case in its essential features is similar to and must be decided like the case of *Savage v. Donovan*, *ante* p. 692, 204 Pac. 805. Reversed, with directions to the lower court to enter a judgment of nonsuit and dismissal of the action.

¹Reported in 203 Pac. 956.

²Reported in 204 Pac. 807.

INDEX

Abandonment:

- Of prosecution in justice court and filing new complaint charging higher offense, see **CRIMINAL LAW**, 2.
- Of leased premises, see **LANDLORD AND TENANT**, 2.
- Of operation of ferry by port district, see **MUNICIPAL CORPORATIONS**, 1, 2.
- Of work by contractor, see **MUNICIPAL CORPORATIONS**, 9.

Abatement and Revival:

- Election of remedy, see **ELECTION OF REMEDIES**.
- Judgment as bar in another action, see **JUDGMENT**, 3.

Absence:

- Of witnesses ground for continuance, see **CONTINUANCE**.

Abutting Owners:

- Assessments for expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 11-15.

Acceptance:

- Of goods sold, in general, see **SALES**, 6.

Accident:

- Collision on highway, see **HIGHWAYS**.
- To person in city street, see **MUNICIPAL CORPORATIONS**, 18-26.
- To person at railroad crossing, see **RAILROADS**.
- To person on or near track, see **STREET RAILROADS**.

Accommodation Makers:

- See **BILLS AND NOTES**, 1, 3.

Account:

- Accounting by guardian of infant, see **GUARDIAN AND WARD**.

Accrual:

- Of right of action, see **LIMITATION OF ACTIONS**.

Acknowledgment:

- Operation and effect of admissions as evidence, see **EVIDENCE**, 3.

Action:

See **BILLS AND NOTES**.

Assignees, see **ASSIGNMENTS**, 2.

To recover for legal services, see **ATTORNEY AND CLIENT**, 4.

For broker's commissions, see **BROKERS**.

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.

Loss of or injury to goods, see **CARRIERS**, 10, 11.

By or against corporations, see **CORPORATIONS**.

For wrongful death, see **DEATH**.

By heirs, see **DESCENT AND DISTRIBUTION**.

For divorce, see **DIVORCE**.

Election of remedy, see **ELECTION OF REMEDIES**.

By or against executors and administrators, see **EXECUTORS AND ADMINISTRATORS**.

For damages for fraud inducing sale, see **FRAUD**.

To establish oral gift of land, see **GIFTS**.

By ward to set aside settlement with guardian, see **GUARDIAN AND WARD**, 3.

For injuries from collision on highway, see **HIGHWAYS**.

By or against husband or wife, see **HUSBAND AND WIFE**.

On insurance policy, see **INSURANCE**.

Splitting of causes of action, see **JUDGMENT**, 3.

Bar by former adjudication, see **JUDGMENT**, 3.

By lessee for possession, see **LANDLORD AND TENANT**, 3, 4.

Limitation by statute, see **LIMITATION OF ACTIONS**.

Enforcement of logger's lien, see **LOGS AND LOGGING**.

For wages, see **MASTER AND SERVANT**, 1.

By servant for personal injuries, see **MASTER AND SERVANT**, 2, 3.

Injuries to third person by employee, see **MASTER AND SERVANT**, 3.

Foreclosure of mortgage, see **MORTGAGES**.

For injuries from automobiles in streets, see **MUNICIPAL CORPORATIONS**, 18-26.

Right to sue as real party in interest, see **PARTIES**.

Recovery of money paid, see **PAYMENT**.

Injuries from accident at crossings, see **RAILROADS**.

Breach of contract, see **SALES**.

Breach of contract for lease of boat, see **SHIPPING**.

Against street railroads for personal injuries, see **STREET RAILROADS**.

Reduction of assessment, see **TAXATION**, 1-3.

For damages for poor service rendered by telephone company, see **TELEGRAPHS AND TELEPHONES**.

Establishment and enforcement of trust, see **TRUSTS**.

For breach of war contract, see **UNITED STATES**.

Recovery of price paid for land, see **VENDOR AND PURCHASER**, 2.

Determination of water rights, see **WATERS AND WATER COURSES**, 1-4.

Action—Continued.

1. **ACTION (24)—JOINDER OF CAUSES—PARTIES AND INTERESTS INVOLVED.** A complaint is demurrable for misjoinder of causes of action, under Rem. Code, § 296, where it joins a stockholders' action brought on behalf of, and common to, all stockholders, with another cause of action not common to all stockholders, but existing only in favor of the plaintiffs for the recovery of money loaned to the corporation and the foreclosure of the security given therefor. *Hames v. Spokane-Benton County Natural Gas Co.*..... 156

Adequate Remedy at Law:

Adequacy of remedy by appeal, see **CERTIORARI**.

Adjudication:

Operation and effect of former adjudication, see **JUDGMENT**, 3.

Administration:

Of charity, see **CHARITIES**, 4.

Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

Admission:

To practice law, see **ATTORNEY AND CLIENT**, 1-3.

Admissions:

As evidence in civil actions, see **EVIDENCE**, 3.

In answer, see **PLEADING**, 2.

Affidavits:

As part of record on appeal, see **APPEAL AND ERROR**, 5.

On motion for continuance, see **CONTINUANCE**.

As to posting of notice of proceedings, see **EMINENT DOMAIN**, 3.

As to creditors, on sale of goods in bulk, see **FRAUDULENT CONVEYANCES**, 2, 3.

On motion for new trial, see **NEW TRIAL**, 2, 4, 5.

Agency:

See **PRINCIPAL AND AGENT**.

Agreement:

See **CONTRACTS**.

Agriculture:

1. **AGRICULTURE (8) — LABOR LIENS — PRIORITIES — STATUTES — CONSTRUCTION.** A farm laborer's lien on crops, as provided by Rem. Code, §§ 1188, 1189, is superior to a prior chattel mortgage on the same crops, where both claims have been filed in compliance with the statutes governing them; *Id.*, § 3660, giving priority to a duly executed and recorded chattel mortgage over subsequent incumbrances not applying in case of statutory liens. *Musgrave v. Atkinson* 323

Alimony:

In action for divorce, see **DIVORCE**, 1, 5, 6.

Separate maintenance, see **HUSBAND AND WIFE**, 6, 7.

Amendment:

Of pleading, see **PLEADING**, 3.

Of statute, see **STATUTES**, 1.

Amount:

Of recovery on appeal as dependent on relief sought in complaint, see **APPEAL AND ERROR**, 3.

Annexation:

Of personalty to real property, see **FIXTURES**.

Answer:

In pleading, see **PLEADING**, 1-3.

Appeal and Error:

Existence of remedy by appeal as bar to certiorari, see **CERTIORARI**.

Costs on appeal, see **COSTS**, 3.

Alimony and suit money pending appeal, see **DIVORCE**, 6.

Judicial notice by appellate court, see **EVIDENCE**, 1, 2.

As affecting right to allowance for separate maintenance, see **HUSBAND AND WIFE**, 6, 7.

Remedy by appeal or writ of error as barring mandamus, see **MANDAMUS**.

Assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 13-15.

III. DECISIONS REVIEWABLE.

1. **APPEAL (47)—DECISIONS APPEALABLE—FINAL ORDERS—RULINGS ON DEMURRER.** An appeal does not lie from an order overruling a demurrer, in the absence of a final judgment against the demurrant. *LeBlank v. Eller*..... 353

V. PRESERVATION OF GROUNDS.

2. **APPEAL (126)—PRESERVATION OF GROUNDS—OBJECTIONS—CONDUCT OF COUNSEL.** Misconduct of counsel for the prevailing party cannot be urged as ground for new trial where no objection or exception was taken at the time. *Johnson v. Smith*..... 146
3. **APPEAL (133)—PRESERVATION OF GROUNDS—PLEADINGS—AMOUNT OF RECOVERY.** The relief sought by plaintiff in his complaint limits his recovery on appeal, where he made application for a larger amount and subsequently withdrew it in the court below. *Dawson v. Greenfield* 454

Appeal and Error—Continued.

4. SAME (151½)—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS—TIME AND MANNER OF TAKING. An erroneous instruction respecting damages recoverable by a parent for the death of a minor child will not be considered on appeal, where objection was not raised by motion for nonsuit, judgment non obstante, nor a directed verdict, and where the written exception to the instruction was filed with the clerk three days after judgment without ever having been called to the attention of the trial court. *Swenland v. Gregory*..... 640

X. RECORD.

5. APPEAL (272)—RECORD—STATEMENT OF FACTS—AFFIDAVITS. Misconduct of the jury in rendering a quotient verdict will not be considered on appeal when the affidavits relative thereto are not made a part of the statement of facts. *Swenland v. Gregory*..... 640
6. APPEAL (263, 301)—RECORD—TRANSCRIPT—CERTIFICATE TO STATEMENT OF FACTS. Where there is nothing in the record on appeal except the clerk's transcript of the pleadings, and a statement of facts which is not certified by the trial judge, the judgment of the lower court, based upon issues of fact, will be affirmed. *Union State Bank v. Miller* 321
7. APPEAL (268)—RECORD—EVIDENCE—SPECIAL PROCEEDINGS. Where the statement of facts in a will contest on the ground of undue influence and incompetency has been stricken on appeal, the decree of the lower court will be affirmed when it is supported by findings that the deceased in making the will was not acting under any duress, fraud or undue influence, that he was fully competent to execute the will, and that it was in all respects executed and proved according to law. *In re Bell's Estate*..... 545

XVI. REVIEW.

8. APPEAL (386)—REVIEW—ESTOPPEL TO ALLEGE ERROR. The refusal of the court to give judgment on a particular claim of indebtedness involved on the trial cannot be urged as error where there was no appeal from such refusal. *Harden v. State Bank of Goldendale* 234
9. APPEAL (386)—REVIEW—RIGHT TO ALLEGE ERROR—ADMISSIONS IN ANSWER. The appellate court cannot disregard a matter not presented to it until the filing of a reply brief, where the record shows it had been raised by objection in the trial court. *Rowell v. Eldridge Buick Co.*..... 697
10. APPEAL (388)—RIGHT TO ALLEGE ERROR. On appeal from an order of distribution of an estate, the question of sale of property of the estate for more than the amount of the judgment will not be examined, when there was no appeal from such action and the period of redemption has passed. *In re Stoops' Estate*..... 153

Appeal and Error—Continued.

11. **APPEAL (396)—REVIEW—PRESUMPTIONS—INSTRUCTIONS.** On appeal from a judgment based on a verdict, it will be assumed, in the absence of the instructions, that questions of fact upon which reasonable minds might differ were properly submitted under correct instructions. *Warren v. Sheane Auto Co.*..... 213
12. **APPEAL (414)—REVIEW—VERDICT.** The verdict of the jury upon conflicting evidence is conclusive on appeal upon all questions properly submitted to the jury. *Carlson v. Herbert*..... 82
13. **APPEAL (416)—REVIEW—FINDINGS.** Though a divorce action is triable *de novo* on appeal, the findings of the trial court on conflicting evidence are of great weight, in view of the fact that it saw the witnesses and their demeanor and was in a better position to pass upon their credibility. *Hughes v. Hughes*..... 262
14. **APPEAL (418)—REVIEW—FINDINGS.** Where the evidence does not clearly preponderate against a finding of the trial court, the finding will be acquiesced in by the supreme court on appeal. *Frye v. Blackwell & Co.*..... 107
15. **APPEAL (418)—REVIEW—FINDINGS.** Where a finding of the trial court on conflicting testimony is supported by a preponderance of the evidence, it will be sustained on appeal. *Anderson v. McGill* 135
16. **APPEAL (418)—REVIEW—FINDINGS.** The finding of the trial court based upon conflicting evidence will not be disturbed on appeal, when the evidence does not clearly preponderate against it, in view of the opportunity of the trial court to view the witnesses and their demeanor, and to judge of their credibility. *Dunagan v. School District No. 4*..... 160
17. **APPEAL (418)—REVIEW—FINDINGS.** A finding by the trial court on conflicting evidence will not be disturbed on appeal, where it is supported by the weight of the evidence. *Smith v. Telford*.... 502
18. **APPEAL (418)—REVIEW—FINDINGS.** A finding by the trial court based on conflicting evidence with respect to the scale of logs sold by plaintiff to defendant will not be disturbed on appeal. *Mentzer Bros. Lumber Co. v. Russell*..... 528
19. **APPEAL (437)—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS.** The denial of a motion to make a complaint more definite and certain cannot be urged as error on appeal, where the record shows that no prejudice resulted to appellant on account of the denial. *Smith v. Telford*..... 502
20. **APPEAL (445)—REVIEW—HARMLESS ERROR—MISCONDUCT OF COUNSEL.** Improper cross-examination by the prosecuting attorney to which objection is promptly sustained by the court, is harmless error. *State v. Humphreys*..... 472

Appeal and Error—Continued.

21. APPEAL (452)—REVIEW—HARMLESS ERROR NOT AFFECTING TRIAL DE NOVO. On trial *de novo*, the supreme court will consider evidence erroneously excluded and disregard evidence erroneously admitted. *Herren v. Herren*..... 56
22. SAME (460)—HARMLESS ERROR—INSTRUCTIONS. An isolated portion of an instruction in a negligence action telling the jury that plaintiff is required to use that degree of care and prudence which a "person of ordinary intelligence" would use, though technically incorrect, is not prejudicial, where in another part of the same instruction the jury are expressly charged that the question for their consideration is, "Did plaintiff exercise reasonable care and prudence for her own safety under the facts and circumstances in the case?" *Johnson v. Smith*..... 146
23. APPEAL (460)—HARMLESS ERROR—INSTRUCTIONS. An ambiguous statement in the course of oral instructions given by the court cannot be deemed prejudicial where in another part of the instructions the subject-matter to which exception is taken was clearly explained to the jury. *McDermont v. Bateman*..... 230
24. APPEAL (464)—HARMLESS ERROR—INSTRUCTIONS — REFUSAL OF REQUEST. The refusal of the court to give a requested instruction, although it may be correct as an abstract principle of law, is not prejudicial, where the subject-matter is included in general instructions, covering the different features of the law applicable to all the facts. *Johnson v. Smith*..... 146

Apportionment:

Benefits of public improvements, see MUNICIPAL CORPORATIONS, 14.

Appropriation:

Of water rights in general, see WATERS AND WATER COURSES, 1.

Approval:

Of construction of public works, see MUNICIPAL CORPORATIONS, 10.

Architects:

Contracts for services, see CONTRACTS, 2.

Arrest:

1. ARREST (6)—ON CRIMINAL CHARGE—AUTHORITY TO ARREST WITHOUT WARRANT. The sheriff has no authority to arrest without warrant one who was not disturbing the peace, and was not suspected of committing a felony, where the sheriff had no actual knowledge that the party arrested was committing the misdemeanor of unlawfully having possession of intoxicating liquor. *State v. Gibbons* 171

Assault:

Evidence of medical experts, see **CRIMINAL LAW**, 5.

Assault with intent to kill, see **HOMICIDE**, 1.

Assessment:

Of expenses of public improvements, see **DRAINS**, 5, 6.

For public improvements, see **MUNICIPAL CORPORATIONS**, 11-15.

Of tax, see **TAXATION**, 1-3.

By irrigation district, see **WATERS AND WATER COURSES**, 6, 7.

Assignments:

Bill of lading, see **CARRIERS**, 6-9.

Of accounts due corporation, see **CORPORATIONS**, 7.

Of contract of sale, see **SALES**, 10.

1. **ASSIGNMENTS (15)—EQUITABLE ASSIGNMENTS—LOSS OR INJURY TO DEBTOR.** Although a corporation is indebted to its general manager, the execution of a check of the corporation by himself as manager in payment of his private debt does not constitute an equitable assignment, where such check is only part of an entire transaction whereby the corporation is deprived of an amount in excess of its indebtedness to him. *Farmers Market v. Austin* 103
2. **ASSIGNMENTS (20)—OPERATION AND EFFECT—RIGHTS TRANSFERRED—RECOVERY OF FULL AMOUNT.** Where a manufacturer on shipping goods to a purchaser assigns the invoice therefor to a bank for borrowed money less in amount than the face of the invoice, the bank thereby acquires a right of action against the purchaser for the full amount of the invoice price, under Rem. Code, § 191, notwithstanding the assignor may have an interest in the thing assigned. *Leavenworth State Bank v. Wenatchee Valley Fruit Exchange* 366

Assumption:

By judge as to facts, see **TRIAL**, 4.

Of debt or incumbrance by purchaser of land, see **VENDOR AND PURCHASER**, 3.

Attachment:

See **EXECUTION**.

1. **ATTACHMENT (8)—PROPERTY SUBJECT—OWNERSHIP OR POSSESSION OF PROPERTY.** The inchoate right of a debtor to obtain goods whose legal title and right to possession had been vested in banks upon payment of advances made by them, would not subject the goods to liability to attachment by his creditors. *Wickens v. Scheuer* 614

Attorney and Client:

Review of conduct of counsel as dependent on objections in lower court, see **APPEAL AND ERROR**, 2.

Attorney and Client—Continued.

Misconduct of counsel as harmless error, see **APPEAL AND ERROR**, 20.
 Argument and conduct of counsel at trial in criminal prosecution,
 see **CRIMINAL LAW**, 10.

Privileged communications, see **WITNESSES**, 1.

1. **ATTORNEY AND CLIENT (1)—QUALIFICATIONS FOR ADMISSION—EXAMINATION—DISCRETION OF BOARD—STATUTES—CONSTRUCTION.** The state board of law examiners, under Laws 1921, ch. 126, p. 407, is an arm of the supreme court created to aid the court in determining questions incident to the admission and disciplining of attorneys, and its rules in that respect are rules of the court. *In re Ellis* 484
2. **SAME (1)—“MAY” AND “SHALL.”** Laws 1921, p. 411, § 9, providing that applicants to practice law “may be admitted on accredited certificates” or upon examination, and that a diploma from the law school of the University of Washington is an accredited certificate, does not entitle the holder of such a diploma to admission, unless he also passes the bar examination under authority of Laws 1921, p. 417, § 19. *In re Ellis*..... 484
3. **SAME (1).** The right to practice law not being a right *de jure* given by statute, Laws 1921, p. 411, § 9, providing that applicants “may” be admitted on diplomas of graduation from the law school of the University of Washington cannot be construed as mandatory. *In re Ellis*..... 484
4. **ATTORNEY AND CLIENT (44)—ACTION FOR COMPENSATION—EVIDENCE.** In an action by an attorney to recover the reasonable value of legal services, which defendant claimed were to be rendered for a contingent fee, but the attorney testified otherwise, the questions of the rendition of the services and the reasonableness of the fee were for the jury. *McDermont v. Bateman*..... 230

Authority:

Of sheriff to arrest without warrant, see **ARREST**.
 Of agent of importer on transfer of bill of lading, see **CARRIERS**, 6.
 Of corporate officers or agents, see **CORPORATIONS**, 8.
 To choose grantee in deed, see **DEEDS**, 1.
 Of agent, see **PRINCIPAL AND AGENT**, 1.

Automobiles:

Care required in operating automobiles on highway, see **HIGHWAYS**.
 Liability of owner for injuries by employee, see **MASTER AND SERVANT**, 3.
 Injuries from in city streets, see **MUNICIPAL CORPORATIONS**, 18-26.
 Collision with train at crossing, see **RAILROADS**.
 Negligence of driver of automobile struck by car, see **STREET RAILROADS**.

Award:

Of property on divorce, see **DIVORCE**, 4, 5.

Bailment:

Collateral securities, see **PLEDGES**.

Negligence of bailee of fishing net, see **SHIPPING**, 2.

Ballots:

See **ELECTIONS**, 3.

Banks and Banking:

Liability of bank as pledgee of property of estate, see **EXECUTORS AND ADMINISTRATORS**, 1, 2.

Bar:

Admission to practice law, see **ATTORNEY AND CLIENT**, 1-3.

By election of remedy, see **ELECTION OF REMEDIES**.

Of action by former adjudication, see **JUDGMENT**, 3.

Beneficiaries:

In charitable trust, see **CHARITIES**, 2, 3.

Benefits:

From local improvement, see **MUNICIPAL CORPORATIONS**, 14, 15.

Bequests:

To charity, see **CHARITIES**.

Bids:

Contracts with county, notice of, see **COUNTIES**.

Award of contract to highest bidder, for disposal of garbage, see **MUNICIPAL CORPORATIONS**, 7.

Bill of Lading:

See **CARRIERS**, 6-9.

Bills and Notes:

Bills of lading, see **CARRIERS**, 6-9.

Authority of officers to execute notes on behalf of corporation, see **CORPORATIONS**, 5, 8.

Separate and community liability of husband and wife, see **HUSBAND AND WIFE**, 4.

Lands exempt from liability for debt, see **PUBLIC LANDS**.

1. **BILLS AND NOTES** (9, 137)—**EXECUTION—LIABILITY—ACCOMMODATION MAKER**. Under Rem. Code, § 3420, providing that an accommodation maker of a promissory note is liable thereon to a holder

Bills and Notes—Continued.

for value, the fact that one signs notes given for a sale of corporate stock in which he has no interest only as an accommodation maker, and that extension of time for the notes was granted without his knowledge or consent, would not exonerate him from liability. *Kuhn v. Groll*..... 285

2. **BILLS AND NOTES (119)—ACTIONS—BURDEN OF PROOF—CONSIDERATION.** In an action on a check, there is no burden on plaintiff to show consideration for its issuance, in view of Rem. Code, §§ 3415, 3575, providing that every negotiable instrument shall be deemed to have been issued for a valuable consideration, and that the provisions of the negotiable instruments act governing bills of exchange apply to checks. *West & Wheeler v. Longtin*..... 575

3. **BILLS AND NOTES (119, 136)—CONSIDERATION—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY.** In an action on a promissory note to which the defense is interposed that it was given as an accommodation note without consideration, the burden of proof is upon the maker, and a finding by the trial court on conflicting evidence will not be disturbed on appeal, where the evidence does not preponderate against the finding. *Woodland State Bank v. McKean* 451

Blanks:

Execution in blank, see **DEEDS**, 1.

Bona Fide Purchaser:

Of lands, see **VENDOR AND PURCHASER**, 4.

Bonds:

Drainage districts, see **DRAINS**, 5.

Contractor's bond, see **MUNICIPAL CORPORATIONS**, 8.

Sureties on bonds, see **PRINCIPAL AND SURETY**.

Books:

Furnishing free text books to pupils, see **SCHOOLS AND SCHOOL DISTRICTS**.

Boundaries:

Of school district, see **ELECTIONS**, 2.

Brands:

Owner's mark on logs as evidence of title, see **LARCENY**, 1.

Breach:

Damages for breach of contract, see **DAMAGES**.

Of contract for public work, see **MUNICIPAL CORPORATIONS**, 9.

Of contract of sale, see **SALES**.

Of charter by charterer, see **SHIPPING**.

Brokers:

Authority of agent on receiving goods on transfer of bill of lading, see CARRIERS, 6.

Right to sue as real party in interest, see PARTIES.

Agency in general, see PRINCIPAL AND AGENT.

1. **BROKERS (3, 14)—EMPLOYMENT—DURATION—PERFORMANCE WITHIN TIME SPECIFIED—CONSTRUCTION OF CONTRACT.** A broker's contract fixing the price of property and providing for payment of "balance this fall" was not a limitation on the time of continuance of the contract, in view of an express provision therein that it was to run "for the period of sixty days from date hereof and hereafter until withdrawal by ten days' written notice." *Gunning v. Muller*... 685
2. **SAME (3, 14).** An exclusive brokerage contract granted "until withdrawal by ten days' written notice" is not invalid as extending over an indefinite or unreasonable time, inasmuch as it is easily revocable by written notice under the terms of the contract. *Gunning v. Muller*..... 685
3. **SAME (9)—EMPLOYMENT OF BROKER—CONTRACT—CONSIDERATION.** A contract agreeing to pay a broker a commission in consideration of services to be performed in endeavoring to effect a sale of the owner's property, cannot be said to be without consideration on the broker's part where he did perform services by devoting considerable time and expense in trying to sell the property to a number of persons, including those who finally purchased it. *Gunning v. Muller* 685
4. **BROKERS (16)—COMPENSATION—PROCURING CAUSE OF SALE—EVIDENCE—SUFFICIENCY.** A broker employed to procure a purchaser for the lease and furniture of an apartment house at a listed price, the owner retaining the right to make a sale direct and pay no commission if the broker was not the procuring cause, is not entitled to a commission where the owner enters into an agreement for a sale at a reduced price on condition that the sum is to be net to her, and in ignorance of the broker's having brought the sale to the attention of the customer, and the sale is never consummated. *Antill v. Lorah*..... 680
5. **BROKERS (18)—COMPENSATION—PERFORMANCE OF CONTRACT—NEGOTIATIONS THROUGH OTHER AGENTS.** Where property listed with a real estate broker for sale under an exclusive agency contract is sold by the owner through another agent while the contract is still in force, the broker is entitled to his commission. *Gunning v. Muller* 685

Building Contracts:

Sureties on building contractor's bond, see PRINCIPAL AND SURETY.

Burden of Proof:

In action on check or note, see **BILLS AND NOTES**, 2, 3.

Cancellation of Instruments:

1. **CANCELLATION OF INSTRUMENTS (6)—FRAUD.** The wrongful act of an agent, delegated with authority to fill in the name of a grantee left blank, in expending the money procured by him from the grantee, is not ground for setting aside the deed by the grantor. *Wright v. Heyting*..... 436

Canvass of Votes:

See **ELECTIONS**, 4-6.

Capacity to Sue:

See **CORPORATIONS**, 9.

Carriers:

Recovery of overcharge by shipper, on ground of mistake, see **PAYMENT**.

1. **CARRIERS (3-1, 6)—REGULATION—POWERS OF COMMISSION—DISCRIMINATION.** A public service commission in fixing freight rates may, under certain conditions, take into consideration things done by shippers which would reduce the cost of transportation, provided they are of such importance as to distinguish such shippers from others, but they should be individual acts of material consequence and not a number of acts each of small significance. *Public Service Commission v. State ex rel. Great Northern R. Co.*..... 629
2. **SAME (3-1, 6).** Where a public service commission, in determining the fairness of a carrier's rate schedule, undertakes a comparison with the charges of other carriers, it should take into consideration such circumstances as the distance of the haul, the amount of competition, the amount of money invested in the particular road bed and equipment, and other like things. *Public Service Commission v. State ex rel. Great Northern R. Co.*..... 629
3. **CARRIERS (6)—REGULATION OF RATES—PREFERENCES AND DISCRIMINATIONS.** The public service statute does not contemplate that the charge made by a carrier for a particular class of service shall always be exactly the same to all shippers, but it does require the fixing of a tariff which is general and public, rather than individual, and that shipments under it be made according thereto, and not according to exceptions to it. *Public Service Commission v. State ex rel. Great Northern R. Co.*..... 629
4. **SAME (6).** The fact that a timber company at its own expense furnishes facilities for the shipment of its logs, such as constructing steel bunks on the cars, providing train loads of logs to the railroad, which does away with switching, coupling and spotting of cars

Carriers—Continued.

- and furnishes extra help in unloading its cars, thus enabling each car to be loaded and unloaded once in each 24 hours, for which service it is charged the same freight rates as other shippers who do not furnish such facilities, does not show discrimination against it in favor of such other shippers. *Public Service Commission v. State ex rel. Great Northern R. Co.*..... 629
5. SAME (6). A freight charge to a shipper furnishing train load lots of a less rate than to a competitor furnishing less than train load lots is unlawful, as in effect allowing lower rates upon a condition which only a few shippers can comply with. *Public Service Commission v. State ex rel. Great Northern R. Co.*..... 629
6. SAME (10)—BILLS OF LADING—AUTHORITY OF AGENT. When a broker for an importer receives goods in transit to which title has passed to bankers under letters of credit and indorsement by the importee of bills of lading, the broker takes the goods as agent of the bankers, although the broker is unaware of the situation and was at the same time acting as agent of the importer in other matters. *Wickens v. Scheuer*..... 614
7. CARRIERS (14-2)—BILLS OF LADING—INDORSEMENT OR OTHER TRANSFER. Where it is the intention of parties to pass title to goods by the indorsement of a bill of lading, the title duly passes; and such intent is shown by letters of credit issued to an importer, which required the draft against it to be attached to a bill of lading, indorsed to the bank issuing the letter of credit, and required documents of title and insurance for the bank's protection. *Wickens v. Scheuer* 614
8. SAME (14-2)—BILLS OF LADING—TRANSFER. The surrender by a broker of bills of lading upon delivery of the goods covered thereby would render duplicate bills void only so far as the carrier is concerned and would not affect the contract of other parties respecting such bills. *Wickens v. Scheuer*..... 614
9. SAME (14-2). Where an importer never had possession of goods whose title had passed to banks on indorsement of the bills of lading to them on letters of credit issued to the importer, the fact that the importer had the right to obtain the goods upon payment of the sums due the banks would not subject the goods to any liability to his creditors. *Wickens v. Scheuer*..... 614
10. CARRIERS (27, 33)—OF GOODS—LOSS OF OR INJURY TO GOODS—LIABILITY—PROOF OF TITLE. Where an electric motor, in course of shipment by carrier between the prospective seller and buyer of the motor, is damaged by the negligence of the carrier, the seller is the proper party to maintain action against the carrier, if there had been in fact no acceptance of the motor by the buyer, no payment of any part of the purchase price, no consummated sale, and

Carriers—Continued.

the mutual dealings of the parties had been closed on the basis that no sale had taken place. *Gray & Barash, Incorporated, v. Puget Sound Navigation Co.* 376

11. SAME (27, 33). Where damages are sought from a common carrier for injury to property while in its possession for carriage, and it has no interest in the ownership of the property other than that of not being called upon to answer more than once for its wrong, the same high degree of proof of ownership is not required as is the case when a contest is between individuals each claiming the title. *Gray & Barash, Incorporated, v. Puget Sound Navigation Co.*.... 376

Causes of Action:

Amendment setting up new cause of action, see PLEADING, 3.

Certificate:

To statement of facts or bill of exceptions, see APPEAL AND ERROR, 6.
Of amount earned under contract, see MUNICIPAL CORPORATIONS, 10.
Filing duplicate on sale of land for delinquent irrigation tax, see WATERS AND WATER COURSES, 7.

Certiorari:

1. CERTIORARI (6)—ADEQUACY OF REMEDY BY APPEAL. Certiorari to the supreme court will lie to review a judgment in mandamus directing the clerk of a school district to call an election, where an appeal would be inadequate because of the necessity of giving notice of election before an appeal could be heard. *State ex rel. Carpenter v. Superior Court*..... 664

Change of Venue:

In action against corporation, see CORPORATIONS, 10.

Character:

Instructions as to character of accused in criminal prosecution, see CRIMINAL LAW, 7.

Charge:

To jury in criminal prosecutions, see CRIMINAL LAW, 6-8.
To jury in civil actions, see TRIAL, 4-9.

Charges:

By carrier, see CARRIERS, 1-5.
By water company for fire protection, see WATERS AND WATER COURSES, 4.

Charities:

Exemption of property of charitable institution from taxation, see TAXATION, 4.

Charities—Continued.

1. **CHARITIES—BEQUEST TO MUNICIPALITY.** A bequest to a municipality of another state as trustee merely, for a charitable purpose, is a valid one, where there is nothing in its charter denying it power to act in such capacity. *In re Maynes' Estate*..... 644
2. **CHARITIES (3, 4)—BEQUESTS—CERTAINTY AS TO BENEFICIARIES AND PURPOSES.** A bequest by a testatrix to the "Trustees of the Masonic and Eastern Star Home at Puyallup, Washington," the home being an unincorporated auxiliary of the Masonic Grand Lodge of the state, by whom its trustees were appointed, constitutes a valid gift to charity, though not using the words "in trust," in view of extrinsic evidence showing the charitable work in which the home is engaged, presumably to her knowledge, and no other intent on her part than to give to charity being discoverable from the will. *de la Pole v. Lindley* 398
3. **SAME (3).** A bequest to trustees of an institution is a bequest to the institution itself. *de la Pole v. Lindley*..... 398
4. **SAME (7)—ADMINISTRATION OF FUND.** Where the object of a charitable bequest is identified, the court has power to carry out the intended purpose through such legal entity as may be in control of the institution at the time, or, if necessary, through a trustee of its own appointment. *de la Pole v. Lindley*..... 398

Charter:

Breach of charter by charterer, see SHIPPING.

Chattel Mortgages:

Rights of subsequent mortgagee as against assignee of contract, see SALES, 10.

Checks:

Burden of proof to show consideration for, see BILLS AND NOTES, 2.

Child:

See GUARDIAN AND WARD.

Rights, duties and liabilities of parents and children incident to the existence of the relation, see PARENT AND CHILD.

Chose in Action:

Pledge of by executors of estate, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Cities:

See MUNICIPAL CORPORATIONS.

Claims:

Against receiver, see CORPORATIONS, 12, 13.

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Against municipal corporations, see MUNICIPAL CORPORATIONS, 27.

Collateral Attack:

On judgment, see JUDGMENT, 1.

Collateral Security:

See PLEDGES.

Pledge of property by executor, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Collision:

Between automobiles, see HIGHWAYS.

Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 18-26.

Injuries to traveler at railway crossing, see RAILROADS.

Between street cars or with vehicles, see STREET RAILROADS.

Commerce:

Carriage of goods and passengers, see CARRIERS.

Commissions:

Of broker, see BROKERS, 4, 5.

Community Property:

See HUSBAND AND WIFE, 1-5.

Compensation:

Of attorney, see ATTORNEY AND CLIENT, 4.

Of broker, see BROKERS, 4, 5.

Of attorney on foreclosure of mortgage, see COSTS, 2.

Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.

For services, see MASTER AND SERVANT, 1.

Complaint:

In criminal prosecution, see CRIMINAL LAW, 2.

Compromise and Settlement:

Admissibility of offers to compromise, see EVIDENCE, 3.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Condition:

Precedent to finding of capacity of corporation to sue, see CORPORATIONS, 9.

Conditional Sales:

See SALES, 7, 9, 10.

Conditions:

- In contracts, see **CONTRACTS**, 1.
- In contracts of sale, see **SALES**, 2.

Conduct of Counsel:

- Review of rulings as dependent upon exception in lower court, see **APPEAL AND ERROR**, 2.
- As harmless error on appeal, see **APPEAL AND ERROR**, 20.
- In criminal prosecution, see **CRIMINAL LAW**, 10.

Conflict of Laws:

- Conflict between municipal and general laws, see **MUNICIPAL CORPORATIONS**, 17.

Consent:

- Of owner as affecting right to lien, see **MECHANICS' LIENS; MINES AND MINERALS**.

Consideration:

- For check, burden of proof, see **BILLS AND NOTES**, 2.
- Of bill of exchange or promissory note, see **BILLS AND NOTES**, 3.
- For broker's contract, see **BROKERS**, 3.
- For issuance of stock, see **CORPORATIONS**, 2.
- For payment, see **PAYMENT**.
- For contract for lease of boat, see **SHIPPING**, 1.
- As affecting bona fides of purchaser of land, see **VENDOR AND PURCHASER**, 4.

Constitutional Law:

- Validity of laws increasing punishment for subsequent offenses, see **INTOXICATING LIQUORS**, 3.
- Delegation of municipal power, see **MUNICIPAL CORPORATIONS**, 2.

Construction:

- Of contract, see **BROKERS**, 1, 2; **CONTRACTS**, 3.
- Of water contract, see **COVENANTS**.
- Of contract for liquidated damages or penalty, see **DAMAGES**, 1, 2.
- Of contract of sale, see **SALES**, 1, 2, 9.
- Of statutes, see **STATUTES**, 2, 3.
- Of agreements relating to court proceedings, see **STIPULATIONS**.
- Of war contract for spruce timber, see **UNITED STATES**.

Continuance:

1. **CONTINUANCE (13)—GROUNDS—ABSENCE OF WITNESS.** A motion for a continuance on the ground of an absent witness is insufficient under Rem. Code, § 322, unless presented by affidavit. *Lincoln v. Kuskokwim Fishing & Transportation Co.*..... 137

Contractors:

Bonds of on public work, see MUNICIPAL CORPORATIONS, 8.

Contracts:

Compensation of broker, see BROKERS.

Transportation of goods, see CARRIERS, 6-9.

Of corporation, see CORPORATIONS, 1.

Notice of highway improvement contract, see COUNTIES, 4.

Covenants in deeds, see COVENANTS.

Liquidated damages or penalties, see DAMAGES, 1, 2.

Measure of damages for breach, see DAMAGES, 3-9.

For electric current, see ELECTRICITY.

Admission of parol or extrinsic evidence, see EVIDENCE, 7-9.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of husband or wife, see HUSBAND AND WIFE, 3-5.

Of insurance in general, see INSURANCE.

Splitting of causes in action on contract, see JUDGMENT, 3.

Employment, see MASTER AND SERVANT, 1.

To sustain mechanics' lien, see MECHANICS' LIENS.

Municipal contracts, see MUNICIPAL CORPORATIONS, 3, 4, 7-10.

As to custody or control of child, see PARENT AND CHILD.

Ratification of acts of agent, see PRINCIPAL AND AGENT, 3.

Of suretyship, see PRINCIPAL AND SURETY.

Sales of personalty, see SALES.

For lease of boat for fishing season, see SHIPPING.

Specific performance, see SPECIFIC PERFORMANCE.

Stipulation in actions, see STIPULATIONS.

War contracts for spruce lumber, see UNITED STATES.

Sale of land, see VENDOR AND PURCHASER.

Water rights, see WATERS AND WATER COURSES, 2-4.

1. **CONTRACTS (4)—MUTUALITY OF OBLIGATIONS.** A contract whereby a mill company transfers its steam plant to an electric company, for which it is to supply fuel in return for electric power and light, cannot be said to be void for want of mutuality because of the possibility of the mill company's ceasing to operate its plant at pleasure, where the contract also provides that, in case of a "shut down" of the mill, the electric company shall have the use of its saws and conveyors for the purpose of supplying necessary fuel. *Sunset Shingle Co. v. Northwest Electric & Water Works*.....416
2. **CONTRACTS (12)—TERMS AND CONDITIONS—EVIDENCE OF AGREEMENT.** Under a contract between an architect and a church building committee whereby he was to be compensated by a commission of one per cent on the estimated cost of a proposed building for his services in helping to select a plan, in case such plan was accepted, the architect is not entitled to compensation for his services where

Contracts—Continued.

no plan was accepted and the failure to accept a plan is not shown to be arbitrary. *Baker v. Central Methodist Church*..... 402

3. **CONTRACTS (72)—ENTIRE OR SEVERABLE CONTRACTS.** Whether a contract is divisible or indivisible so as to permit the maintenance of more than one action thereon, is determinable upon the bare facts of the contract itself; and a contract is divisible where it requires a purchaser of automobile trucks to pay a certain sum on a specified date, and also to pay designated accounts and bills due and owing by the seller. *Helsley v. American Mineral Production Co.* 571

Contributory Negligence:

Of person injured in city street, see **MUNICIPAL CORPORATIONS**, 18-20, 26.

Of person injured at crossing, see **RAILROADS**, 2-6, 8.

Of driver of vehicle, see **STREET RAILROADS**.

Conveyances:

See **ASSIGNMENTS; EASEMENTS**.

In general, see **DEEDS**.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

As security for debt, see **MORTGAGES**.

In trust, see **TRUSTS**, 1.

Water rights, see **WATERS AND WATER COURSES**, 2, 3.

Corporations:

See **MUNICIPAL CORPORATIONS**.

Joinder of causes of action against, see **ACTION**, 1.

Contracts by public service corporations, see **ELECTRICITY**.

Claim against city for damages, see **MUNICIPAL CORPORATIONS**, 27.

Pledge of stock to secure debt of purchaser, see **PLEDGES**.

1. **CORPORATIONS—CONTRACTS—LIABILITY OF STOCKHOLDER OF CORPORATION.** The presence of individual stockholders of a fruit growing corporation at a meeting between the corporation and a fruit buyer, in which such stockholders voted that the corporation sell the fruit of the members to the fruit buyer, would not create a contract liability against the individual stockholders. *Barnett Bros. v. Lynn* 308
2. **CORPORATIONS (52)—STOCK—CONSIDERATION FOR ISSUANCE—ESTOPPEL TO ALLEGE INVALIDITY.** One holding a valid subsisting lien against mining claims, does not lose it by an invalid attempt to sell the property under foreclosure; and a sale of the claims to a corporation in consideration of corporate stock would transfer an equitable right to the lien and would afford at least partial consideration for a transfer of the corporate stock. *Huffman v. Ellen Mining Co.* 546

Corporations—Continued.

3. SAME (88)—STOCKHOLDERS—SUITS ON BEHALF OF CORPORATION—ESTOPPEL. In an action by stockholders to cancel an issuance of stock to an individual on the ground of failure of consideration in that the shares had been issued to him in exchange for mining claims which he as a judgment creditor had acquired under an invalid foreclosure of a mining lien, an offer to reimburse him to the extent of his judgment would not place him in *statu quo*, but he would be entitled to a reconveyance of the mining property subject to the corporation's after acquired title, so that he could exercise his right of resale. *Huffman v. Ellen Mining Co.*..... 546
4. SAME (88). Any principle of estoppel operative against a corporation applies against stockholders who exercise the right to sue on the refusal of the corporation to bring suit. *Huffman v. Ellen Mining Co.*..... 546
5. CORPORATIONS (165)—REPRESENTATION—RATIFICATION. Where a corporation repudiates the act of its general manager in executing a corporate note in payment of a private debt as soon as it has knowledge of the act, it cannot be said to have ratified the act. *Farmers Market v. Austin.*..... 103
6. SAME (165). The right of action of a corporation against a person to whom its agent had wrongfully paid corporate money is not waived by any election of remedies against such agent in an effort to recover the money. *Farmers Market v. Austin.*..... 103
7. CORPORATIONS (172)—REPRESENTATION BY OFFICERS—DISPOSAL OF ASSETS. The fact that a corporation has ceased to operate its business would not, in the event there had been no dissolution, deprive it of the right to make an assignment of accounts due it. *Lincoln v. Kuskokwim Fishing & Transportation Co.*..... 137
8. CORPORATIONS (178)—CONTRACTS—NOTICE OF AUTHORITY OF OFFICER TO PERSON DEALING WITH CORPORATION. Where a debtor gives a check executed in the name of a corporation, by himself as manager, to his individual creditor in payment of a debt, such creditor, having parted with nothing of value in reliance upon any act of the corporation, is chargeable with notice that the manager had no authority to pay his private debt, and cannot defeat action for recovery of the amount on the theory of being an innocent third party. *Farmers Market v. Austin.*..... 103
9. CORPORATIONS (193)—ACTIONS—CAPACITY TO SUE—CONDITIONS PRECEDENT—ISSUES—FAILURE OF PROOF. Where an issue has been raised by the pleadings as to the capacity of a corporation to sue, a finding by the court of such capacity is unwarranted in the absence of proof addressed to that issue. *Frye & Co. v. Merchants' Transportation Co.* 602
10. CORPORATIONS (195)—VENUE (10,16)—CHANGE—POWER OF COURT—ACTION AGAINST CORPORATION IN WRONG COUNTY. Where an ac-

Corporations—Continued.

tion against a corporation is commenced in the wrong county, the court has no jurisdiction to make an order changing the venue to the proper county. *State ex rel. Grays Harbor Commercial Co. v. Superior Court* 674

11. CORPORATIONS (195)—ACTIONS—VENUE—"TRANSACTIONING BUSINESS." A business arrangement by a corporation, with an employment agency in another county to supply workmen from time to time when needed does not constitute the "transacting of business" by the corporation in that county, so as to render it subject to suit therein. *State ex rel. Grays Harbor Commercial Co. v. Superior Court* 674
12. CORPORATIONS (227)—INSOLVENCY—CLAIMS AGAINST RECEIVER—PRESENTATION. Where a director and manager performs services for his corporation clearly outside his duties as such officer on the understanding with the other corporate officers that he is to be compensated therefor, he has a valid claim against the corporation for such services. *Brown v. Wilcox Lumber & Logging Co.*..... 336
13. SAME (227)—RECEIVERS (66)—PREFERRED CLAIMS—NECESSITY OF PRESENTING. Under Rem. Code, § 1153, providing that, in receivership proceedings, all claims for which a lien could be filed shall have preference over other claims, the inchoate right of lien existing at the time a receiver is appointed matures at once without the necessity of the filing of the lien claim. *Brown v. Wilcox Lumber & Logging Co.* 336
14. CORPORATIONS (266) — FOREIGN CORPORATIONS — GARNISHMENT—SERVICE OF WRIT—STATUTES. Under Rem. Code, § 687, providing that writs of garnishment shall be served in the same manner as provided for the service of summons, service upon the assistant cashier in the freight office of a foreign railroad corporation is sufficient, in view of Rem. Code, § 226, subd. 9, which provides that service of summons against a foreign corporation doing business in the state may be made upon "any agent, cashier or secretary thereof"; and the service is governed by subd. 9, rather than by subd. 4, relating to service upon "a railroad corporation," as that refers to domestic corporations. *Sunada v. Oregon-Washington Railroad & Navigation Co.* 241

Costs:

1. COSTS (3)—DISCRETION OF COURT. The matter of costs being entirely within the discretion of the trial court where the judgment was not wholly in favor of one party, a denial of costs to either party cannot be assigned as error. *Hand v. School District No. 1* 439
2. COSTS (11)—MORTGAGES (242)—FORECLOSURE—ATTORNEY'S FEES—TENDER BEFORE SUIT. A mortgagee is not entitled to recover costs

Costs—Continued.

and attorney's fees in a suit to foreclose a mortgage, where foreclosure was denied on the ground that the money to satisfy the mortgage had been duly tendered at or prior to maturity and the tender had been kept good. *Tucker v. Lowenthal*..... 638

3. **COSTS (62)—ON APPEAL—MORE FAVORABLE JUDGMENT.** Costs of appeal are allowable to appellants who recover substantial benefits by their appeal. *Herren v. Herren*..... 56

Counsel:

See ATTORNEY AND CLIENT.

Counties:

Establishment of drains, see DRAINS.

Recitals of record of county board as to notice of letting of contract, see JUDGMENT, 2.

Matters relating to school districts, see SCHOOLS AND SCHOOL DISTRICTS.

Irrigation districts, see WATERS AND WATER COURSES, 5-7.

1. **COUNTIES (43)—CONTRACTS—PROPOSALS FOR BIDS—NOTICE—SUFFICIENCY.** Under Rem. Code, § 5755, requiring that notice of a call for bids for highway improvement "shall be published for at least two consecutive weeks previous to the date of letting" the contract, means that there shall be two full weeks' notice between first publication and time of letting the contract. *Wyant v. Independent Asphalt Paving Co.*..... 345
2. **COUNTIES (43)—CONTRACTS—PROPOSALS FOR BIDS—NOTICE.** Rem. Code, § 5755, providing that notice of the letting of a highway improvement contract shall be published for at least two consecutive weeks previous to the date of letting, cannot be construed as directory with respect to such two weeks' publication, because of the fact the statute further adds, "and in such other manner as the board may see fit to direct." *Wyant v. Independent Asphalt Paving Co.* 345

Courts:

Review of decisions, see APPEAL AND ERROR.

Review of findings in civil action, see APPEAL AND ERROR, 13-18.

Admission to practice law, see ATTORNEY AND CLIENT, 1-3.

Supervision of charitable gifts, see CHARITIES, 4.

Power to change venue of action brought in wrong county, see CORPORATIONS, 10.

Discretion as to costs, see COSTS, 1.

Condemnation proceedings, see EMINENT DOMAIN.

Judicial notice, see EVIDENCE, 1, 2.

Jurisdiction as to disputed claims, see EXECUTORS AND ADMINISTRATORS, 4.

Courts—Continued.

Jurisdiction of action for separate maintenance, see HUSBAND AND WIFE, 6, 7.

Conclusiveness of judgments, see JUDGMENT, 3.

Mandamus to inferior courts, see MANDAMUS.

Restraining exercise of jurisdiction, see PROHIBITION.

Jurisdiction of action against telephone company for poor service, see TELEGRAPHS AND TELEPHONES.

Covenants:

1. COVENANTS (11)—RUNNING WITH LAND—WATER CONTRACT—CONSTRUCTION. Where owners of land on which springs were located, who had collected and stored the water for domestic use, entered into an agreement with the owner of lands over which the waters of the springs had been accustomed to flow, stipulating that the latter should be permitted to tap their pipe and take one-third of the water in consideration of his grant to such appropriators of all his right, title and interest in the waters of such springs, the agreement did not constitute a covenant running with the land. *Aylmore v. Bickford*..... 28

Credibility:

Of witness, see WITNESSES, 2.

Creditors:

See FRAUDULENT CONVEYANCES.

Criminal Law:

See HOMICIDE; INSURRECTION; LARCENY.

Arrest of accused, see ARREST.

Violation of liquor laws, see INTOXICATING LIQUORS.

Trial of civil actions, see TRIAL.

Cross-examination of accused, see WITNESSES, 2.

1. CRIMINAL LAW (9-1) — MERGER OF OFFENSES — STATE AND CITY LAWS. Where an accused was, by stipulation, tried at the same time on a charge of being a jointist and on a violation of a municipal ordinance making unlawful possession of intoxicating liquor a crime, the payment of a fine in one case would not entitle defendant to a dismissal after verdict on the other charge, since they were separate offenses. *State v. Cole*..... 511
2. CRIMINAL LAW (57)—COMPLAINT—ABANDONMENT—NEW COMPLAINT CHARGING HIGHER OFFENSE—RIGHTS OF ACCUSED—JURISDICTION. The abandonment of a prosecution instituted by a prosecuting attorney in a justice court does not militate against his power to file a new complaint charging a higher offense to be tried by the justice as a committing magistrate and thereafter proceed upon proper information filed in the superior court to a trial of the

Criminal Law—Continued.

- accused for a higher offense of which the latter court alone has jurisdiction. *State v. Gibbons*..... 171
3. CRIMINAL LAW (101)—EVIDENCE—RES GESTAE. In a prosecution for the larceny of a quantity of wheat, the testimony of the owner that the defendant voluntarily came to him and offered to pay for the wheat, to which he replied he was not selling wheat, he had been robbed three times and that he wanted this one run down, was admissible as part of the conversation in answer to defendant's offer. *State v. Humphreys*..... 472
4. CRIMINAL LAW (111)—EVIDENCE—OTHER OFFENSES. In a prosecution for uttering a forged check upon a bank, evidence that defendant had previously drawn a number of checks upon a bank in which he once carried an account, but in which he had no funds at the time, is inadmissible for the purpose of showing criminal intent on the charge of forgery. *State v. Weir*..... 493
5. CRIMINAL LAW (155)—OPINION EVIDENCE—TESTIMONY OF MEDICAL EXPERT—ADMISSIBILITY. In a prosecution for assault with homicidal intent, the expert opinion of a physician that, if the shot had struck the body instead of the arm, they could have penetrated the body and entered a vital organ, was admissible in evidence. *State v. Hart* 114
6. CRIMINAL LAW (250)—TRIAL—PROVINCE OF COURT AND JURY—WEIGHT OF EVIDENCE. A requested instruction that if the jury should be satisfied from the evidence that defendant's offer to pay for the stolen wheat, without admitting its larceny, was for the purpose of avoiding publicity, that circumstance should not be regarded as evidence of guilt was properly refused, since the value of such testimony was for the jury. *State v. Humphreys*..... 472
7. CRIMINAL LAW (277)—TRIAL—INSTRUCTIONS—CHARACTER. The refusal of a requested instruction in a prosecution for larceny to the effect that evidence of good character may of itself be sufficient to raise a reasonable doubt as to the guilt of accused was proper, where such evidence has been admitted and the jury charged generally to consider it with other evidence in arriving at their verdict. *State v. Humphreys*..... 472
8. CRIMINAL LAW (306)—TRIAL—ABSTRACT INSTRUCTIONS. An instruction in a criminal case upon confessions and admissions is erroneous, though correct as a proposition of law, where there is no evidence justifying such instruction. *State v. Rader*..... 198
9. SAME (333)—VERDICT—FORM—SEPARATE VERDICTS. Two verdicts returned into court at the same time, one finding the defendant guilty of the crime charged and the other finding the fact of a prior conviction, is in no way prejudicial to the rights of defendant. *State v. Buttignoni*..... 110

Criminal Law—Continued.

10. **CRIMINAL LAW (345)—MOTIONS FOR NEW TRIAL—MISCONDUCT OF COUNSEL.** The denial of a new trial on the ground of improper and prejudicial language of the prosecuting attorney was not an abuse of the court's discretion, where objection to the language was sustained, the counsel admonished, and the jury instructed to disregard it. *State v. Humphreys*..... 472
11. **CRIMINAL LAW (358)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.** The refusal of a new trial on the ground of newly discovered evidence of an alibi was within the sound discretion of the court, where it was cumulative with that given upon the subject at the trial. *State v. Humphreys*..... 472
12. **CRIMINAL LAW (458, 459)—PUNISHMENT—GROSS MISDEMEANORS—STATUTES.** Under Rem. Code, § 2267, providing that one convicted of a gross misdemeanor may be punished both by imprisonment in the county jail and by a fine not exceeding \$1,000, and under Id., §§ 2200, 2209, authorizing the commitment to custody of a defendant adjudged to pay a fine, which, on failure to pay, he shall work out at the rate of two dollars per day, the court has power, upon sentencing a defendant to a term of imprisonment and to pay a fine, to further provide that he should be committed to jail until the fine is satisfied according to law. *State v. Tullock*..... 496
13. **SAME (460)—PUNISHMENT—SUBSEQUENT OFFENSES—PRIOR CONVICTION—EFFECT OF STATUTE OF LIMITATIONS.** The fact that the statute of limitations had run against an offense for which one had been convicted would not affect the power of the court to impose increased punishment for a second violation of the act, as the penalty is not imposed for the prior conviction, which is merely an element of aggravation of the last offense. *State v. Buttignoni* 110
14. **CRIMINAL LAW (460) — PUNISHMENT — SUBSEQUENT OFFENSES—STATUTES—CONSTRUCTION.** Laws 1917, p. 61, § 15, amendatory of § 32 of the initiative measure against the sale of intoxicating liquors (Laws 1915, ch. 2, p. 2) which prescribes a punishment for every person convicted a second time of a violation of any of the provisions of "this act," contemplates convictions under the prior act, since the two acts are to be construed as one act covering the same subject-matter. *State v. Buttignoni*..... 110

Criminal Syndicalism:

See INSURRECTION.

Cross-Examination:

See WITNESSES, 2.

Crossings:

Accidents at street crossings, see MUNICIPAL CORPORATIONS, 18, 19.

Accidents at railroad crossings, see RAILROADS.

Accidents at street car crossing, see STREET RAILROADS.

Custody:

Of school election returns, see ELECTIONS, 4, 5.

Of child, see HABEAS CORPUS; PARENT AND CHILD.

Damages:

For wrongful death, see DEATH.

For failure of lessor to deliver possession, see LANDLORD AND TENANT, 4.

Breach by seller of contract for sale of goods, see SALES, 7.

Breach of charter-party, see SHIPPING, 4.

Provision in contract for liquidated damages as affecting right to specific performance, see SPECIFIC PERFORMANCE, 2.

Remedy of telephone subscriber for poor service, see TELEGRAPHS AND TELEPHONES.

For breach of war contract for spruce lumber, see UNITED STATES.

1. DAMAGES (32)—LIQUIDATED DAMAGES OR PENALTY—CONSTRUCTION OF CONTRACT. A provision in a contract for the sale of land for forfeiture of the sum deposited by the purchaser on failure to complete the purchase within the time stated which deposit shall be in settlement of, and fixed as, liquidated damages, is one providing for liquidated damages instead of penalty. *Asia Investment Co. v. Levin* 620
2. DAMAGES (32, 37)—LIQUIDATED DAMAGES—EFFECT OF STIPULATION—CONSTRUCTION OF CONTRACT. The provision in a contract of sale and purchase of land that the failure of the purchaser to complete the purchase shall operate as a forfeiture of the sum deposited, "the same being in settlement of and hereby fixed as liquidated damages" should be interpreted as meaning that the sum paid down should be taken "in settlement . . . of liquidated damages"; the amount of which "being hereby fixed as liquidated damages"; such interpretation preserving the rights of both parties under the contract, thus entitling vendor to specific performance. *Asia Investment Co. v. Levin*..... 620
3. SAME (72). A valuation fixed by the parties on a steam plant in a transfer by a mill company to an electric company in consideration for a service of electric light and power for which the plant was to be utilized, is not the proper measure of damages on a breach of the contract by the electric company, but the mill company would be entitled to recover for loss of time and expense in changing back to a steam plant and replacing the electrical machinery which had depreciated in value. *Sunset Shingle Co. v. Northwest Electric & Water Works*..... 416
4. DAMAGES (72, 74) —BREACH OF CONTRACT—MEASURE—EXPENSE INCURRED—LOSS OF PROFITS. Under a contract to furnish electricity and steam for a term of thirty-five years, which was breached a few years after it was entered into, the proper measure of damages

Damages—Continued.

is the expense of replacing the lost service, the injured party not being entitled to recover damages on the basis of yearly loss of profits for the balance of the term. *Sunset Shingle Co. v. Northwest Electric & Water Works*..... 416

5. SAME (74, 118)—MEASURE OF DAMAGES—LOSS OF PROFITS—BREACH OF CONTRACT—EVIDENCE. In an action to recover lost profits by a contractor on ship construction work who had been prevented from completing the contract, the fact that the contractor worked as a laborer along with his men would not establish that his loss of time was erroneously included in addition to his loss of profits, where there was no extra claim on account of such personal service. *Wright v. Duthie & Co*..... 564

6. DAMAGES (94) — EXCESSIVE DAMAGES — BREACH OF CONTRACT. Where a shipbuilder, after cancelling a contract for caulking rivets, completed the work for a sum less than the contract price, that fact would not be controlling on the question of the contractor's loss of profits, and hence a verdict in excess of that amount cannot be ascribed to passion and prejudice on the part of the jury. *Wright v. Duthie & Co*..... 564

7. DAMAGES (118)—BREACH OF CONTRACT—LOSS OF PROFITS—EVIDENCE—SUFFICIENCY. The measure of damages for refusing to permit a contractor to complete the caulking of two vessels upon which he was engaged is the loss of profits on the whole contract, the amount of which is properly determinable by the estimates of qualified competent witnesses. *Wright v. Duthie & Co*..... 564

8. DAMAGES (128)—MEASURE—BREACH OF CONTRACT—INSTRUCTIONS. Where loss of profits on a contract was all that was claimed under a complaint and the evidence, a general instruction that the burden was on plaintiff to prove by a fair preponderance of the evidence the material allegations of the complaint, was sufficient. *Wright v. Duthie & Co*..... 564

9. SAME (128)—MEASURE OF DAMAGES—INSTRUCTIONS. In an action for lost profits by reason of the prevention of performance of a contract, where there was neither pleading nor proof of damages for loss of time, an instruction to the jury, that, if they find for plaintiff, they should allow such an amount as will justly compensate him for the damages which have been established by the evidence, is not open to the objection that it allows them to find for plaintiff's loss of time. *Wright v. Duthie & Co*..... 564

Danger:

Apprehension of imminent danger as defense to homicide, see HOMICIDE, 2.

Death:

Of driver of automobile at railroad crossing, see RAILROADS, 1, 4-8.

1. DEATH (5, 35)—INJURIES CAUSING DEATH—RIGHT OF ACTION—MEASURE OF RECOVERY—STATUTES—CONSTRUCTION. Where a minor child received personal injuries from which she later died, leaving parents dependent upon her for support, a right of action survives to her personal representative, under Rem. Code, § 194, to prosecute an action in behalf of such parents, the measure of recovery being the amount which the minor would have recovered for the injury had she lived, to be computed from the time of injury to the date of death. *Machek v. Seattle*..... 42
2. SAME (14).—RIGHT OF ACTION—CONCURRENT ACTIONS—FOR WHOSE BENEFIT. An action by an administrator for the wrongful death of a minor may be prosecuted for the benefit of the parent or parents, under Rem. Code, § 194, independently of, and concurrently with, actions for support, under Id., § 183, as amended by Laws 1917, ch. 123, and for loss of services under Id., § 184. *Machek v. Seattle* 42
3. DEATH (37)—DAMAGES—EXCESSIVE VERDICT. A verdict for \$12,000 for negligently causing the death of a man thirty-nine years of age, having a wife but no children, cannot be said to be excessive, where he was capable of earning \$300 per month during the war period. *Swanson v. Puget Sound Electric R.*..... 4

Debt:

Validity of oral promise to pay debt of another, see FRAUDS, STATUTE OF, 1.

Separate or community debts, see HUSBAND AND WIFE, 4, 5.

Extension of maturity of, see MORTGAGES.

Exemption from, see PUBLIC LANDS.

Debtor and Creditor:

See ASSIGNMENTS; ATTACHMENT; FRAUDULENT CONVEYANCES.

Decedents:

Estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

Deceit:

See FRAUD.

Decision:

Review on appeal, see APPEAL AND ERROR, 1.

Deeds:

Cancellation, see CANCELLATION OF INSTRUMENTS.

Scope of covenant in deed, see COVENANTS.

Deeds—Continued.

Implied grants, see EASEMENTS.

Water rights, see WATERS AND WATER COURSES, 3.

1. DEEDS (13, 16)—EXECUTION IN BLANK—AUTHORITY TO CHOOSE GRANTEE—DELIVERY—SUFFICIENCY. Where a deed was duly executed with the name of the grantee in blank and delivered to another with authority to elect who should be the grantee, the fact that the grantee selected by the agent was directed to write his own name in the deed as grantee, was merely the doing of a physical act and not a delegation of authority to choose the grantee. *Wright v. Heyting* 436
2. DEEDS (17-1, 61)—DELIVERY—EVIDENCE—SUFFICIENCY. The delivery of a deed to a third person to hold until the grantor's death and then record and deliver to the grantee is a valid delivery, where there is no reservation by the grantor of the right to re-take it or control its use; and the declaration of the intermediate holder of the deed that she would have delivered it back to the grantor, if requested by him, would be insufficient to affect the sufficiency of the delivery. *Adams v. Harris*..... 189

Default:

Validity of oral contract to answer for default of another, see FRAUDS, STATUTE OF, 1.

Notice to surety of default of contractor, see PRINCIPAL AND SURETY, 5.

By vendee in payments for land, see VENDOR AND PURCHASER, 2.

Deficiency:

In quantity of goods delivered, see SALES, 3.

Degrees:

Instructions as to degree of offense, see HOMICIDE, 5.

Delay:

In delivery of goods sold, see SALES, 6.

Delegation:

Of governmental powers by port district, see MUNICIPAL CORPORATIONS, 2.

Delivery:

Of deed, see DEEDS.

Of lease, see LANDLORD AND TENANT, 1.

Of property pledged, see PLEDGES.

Of goods sold, see SALES, 2-6.

Demurrer:

Waiver of, by pleading, see PLEADING, 5.

Denials:

In pleading, see PLEADING, 1.

Depositions:

1. DEPOSITIONS (6, 7-1)—RETURN—SEALED ENVELOPES. The requirement of Rem. Code, § 1243, that depositions shall be transmitted by mail in a sealed envelope to the clerk of the court before whom the action is pending is complied with where the deposition is wrapped in wrapping paper whose edges are sealed together and the enclosure reinforced by tying with string and thus deposited in the mail, though the covering may have become torn during the transmission through the mails. *Finn v. Bremerton*..... 381

Deposits:

Deposit of money with third party as tender, see TENDER.

Descent and Distribution:

Inheritance and transfer taxes, see TAXATION, 4.

1. DESCENT AND DISTRIBUTION (13, 14)—ACTIONS BY HEIRS—RECOVERY OF MESNE PROFITS. A daughter, entitled to one-half of the mesne profits of her father's estate, is not entitled to recover therefor from the estate of her mother, where the income from the property was used indiscriminately for the support and pleasure of mother and daughter, and there is no evidence that the entire income was not mutually spent and consumed for such purpose. *de la Pole v. Lindley* 387

Description:

Of lands in order for consolidation of districts, see DRAINS, 3.

Discharge:

From liability as surety, see PRINCIPAL AND SURETY, 5.

Discount:

Right to rebate after tender of tax, see TAXATION, 2.

Discovery:

Of fraud as affecting limitation, see LIMITATION OF ACTIONS.

1. DISCOVERY (11)—PHYSICAL EXAMINATION OF PLAINTIFF—DISCRETION. It is not an abuse of discretion to refuse to order a physical examination of plaintiff in a personal injury case when the plaintiff is in a distant state, her deposition is before the court, and the granting of the order would have required a continuance of the trial and possibly its ultimate dismissal. *Finn v. Bremerton*..... 381

Discretion:

Of state board of law examiners, see ATTORNEY AND CLIENT, 1.

Discretion of Court:

As to costs, see **COSTS**, 1.

To order physical examination of plaintiff, see **DISCOVERY**.

New trial, see **NEW TRIAL**, 2.

To allow amendment of pleadings, see **PLEADING**, 3.

View by jury in civil action, see **TRIAL**, 1.

Discrimination:

By carrier, see **CARRIERS**, 1, 3-5.

In contract for power and light, see **ELECTRICITY**.

Districts:

Drainage districts, see **DRAINS**.

Port districts, see **MUNICIPAL CORPORATIONS**, 1, 2.

Irrigation districts, see **WATERS AND WATER COURSES**, 5-7.

Ditches:

See **DRAINS**.

Diversion:

Of water course, see **WATERS AND WATER COURSES**, 1.

Division:

Of property on divorce, see **DIVORCE**, 4, 5.

Divorce:

Review of findings on appeal, see **APPEAL AND ERROR**, 13.

Separate maintenance, see **HUSBAND AND WIFE**, 6, 7.

1. **DIVORCE** (8-2, 37)—**GROUND**S—**FAILURE TO SUPPORT**—**EVIDENCE**—**SUFFICIENCY**. The refusal of a divorce on the ground of failure to properly support a wife and child is proper, where the evidence shows there was no wilful disregard of such duty on the part of the husband, but only inability to make ample provision for their support, and, in some instances, the exercise of bad judgment in the expenditure of what limited resources he had. *Metzger v. Metzger* 479
2. **DIVORCE** (36)—**GROUND**S—**EVIDENCE**—**SUFFICIENCY**. A decree of divorce awarded a wife, is supported by evidence that the husband maintained a room in an apartment house owned by him and a former wife, using a kitchen in common with her, and that he had treated plaintiff with some physical violence and called her vile names. *Sills v. Sills*..... 94
3. **SAME** (62, 63)—**ALIMONY AND SUIT MONEY**—**AMOUNT**. In a divorce action, where the property rights involved amounted to \$26,000 in value, an award in behalf of the wife of \$650 attorney's fees, \$60 per month for the support of three children whose custody was awarded to her, \$200 per month temporary alimony and a further

Divorce—Continued.

- allowance pending appeal of \$75 suit money, \$500 attorney's fees and \$100 per month was not unreasonable. *Hughes v. Hughes*..... 262
4. SAME (80)—DIVISION OF PROPERTY—EXCESSIVE AWARD. Where the court had made a fair division of the real property of spouses on decreeing a divorce, an order directing the cancellation of a \$750 note given by plaintiff to defendant prior to their marriage for money borrowed by her to make a property settlement with her former husband from whom she was divorced was excessive, and should be modified by striking the money judgment in favor of plaintiff. *Sills v. Sills*..... 94
5. DIVORCE (80)—DIVISION OF PROPERTY—AWARD. Where the community property of a husband and wife was of the value of \$26,000 an award of \$8,000 and \$125 per month alimony on decreeing a divorce in favor of the wife was not excessive. *Hughes v. Hughes* 262
6. DIVORCE (94)—ALIMONY AND SUIT MONEY PENDING APPEAL—JURISDICTION. Pending appeal in a divorce action, the superior court retains jurisdiction to order the husband to pay money to the wife to apply on the cost of her appeal, and also for clothing, medical attendance and a weekly allowance. *Reno v. Reno*.... 49

Documents:

As evidence in civil actions, see EVIDENCE, 5.

Drains:

1. DRAINS (2)—ESTABLISHMENT—CONSOLIDATION OF DISTRICTS—PURPOSE. Under the power conferred on the board of county commissioners by Laws 1917, p. 517, § 1, to order the consolidation of drainage districts when it "will result in economy of the maintenance of such districts," the board is authorized to order the construction of improvements by and on behalf of a consolidated district by taking up the work of its predecessors in whatever stage is may be. *Thurston County v. Clausen*..... 653
2. SAME (5, 6)—ESTABLISHMENT—NOTICE OF HEARING—SUFFICIENCY. The objection that landowners in a consolidated drainage district have not had their day in court as to districts in which they were not property owners is without merit, where ample notice by publication and by posting in three public places in each of the districts was given, and the organization of each district, its plan for improvements, the estimated cost and the amount of benefits were all matters of public record. *Thurston County v. Clausen*.... 653
3. DRAINS (9)—ESTABLISHMENT—CONSOLIDATION OF DISTRICTS—RESOLUTION—DESCRIPTION OF LANDS INCLUDED. An order for the consolidation of two drainage districts, made pursuant to Laws 1917, p.

Drains—Continued.

- 518, § 3, is sufficient where it describes all of the territory included in the original districts, although it does not exactly follow the exterior boundaries of the original districts, due to the fact that the inclusion of a quantity of acreage which had been incorporated in each of the original districts made the following of the original lines superfluous in describing the consolidated district. *Thurston County v. Clausen*..... 653
4. SAME (11)—MODE AND PLAN OF CONSTRUCTION—HEARING. Under Laws 1917, pp. 518, 519, §§ 5, 6, providing that all provisions of law applicable to original drainage districts shall apply to a consolidated district, and that the rights and powers of such districts shall be possessed by the consolidated district, and that consolidation shall not affect the indebtedness of original districts nor the liability of the lands therein situated, there is no necessity for a public hearing before the county board for the purpose of adopting plans for the improvement of the consolidated district. *Thurston County v. Clausen* 653
5. SAME (16-2)—ASSESSMENTS—PROCEEDINGS — ESTIMATES — COST OF IMPROVEMENT. Under Laws 1917, p. 523, § 16, providing that estimates of the cost of a proposed drainage improvement are "preliminary only and shall not be binding as a limit on the amount that may be expended in constructing such system," the fact that the actual cost of the improvement by a consolidated district is more than double the preliminary estimates made for the original districts is immaterial, where no objections have been raised by the landowners, and hence would not invalidate bonds issued to cover the cost. *Thurston County v. Clausen*..... 653
6. SAME (32-2)—ASSESSMENTS—POWER TO LEVY—PROPERTY LIABLE. It is within the power of the legislature to authorize drainage districts to make improvements at the expense of the property specially benefited. *Thurston County v. Clausen*..... 653

Duration:

- Of broker's contract, see **BROKERS**, 1, 2.
- Of contract of employment, see **MASTER AND SERVANT**, 1.
- Of term of office, see **OFFICERS**.
- Of war contract for spruce lumber, see **UNITED STATES**.

Easements:

- In water course, see **WATERS AND WATER COURSES**, 3.

1. **EASEMENTS** (12)—IMPLIED GRANTS—WAYS IN GENERAL. Where a deed to part of a tract of land contained a clause following the warranty reciting "and a road 30 feet wide from Lebbe county road to the premises above described," nothing more than an ease-

Easements—Continued.

ment was granted for a right of way which existed by implication, since there was no other means of access to the county road. *Dawson v. Greenfield*..... 454

2. SAME (12). An easement of a way by implication will pass to the grantee of a parcel of an entire tract of land if it is necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. *Dawson v. Greenfield*... 454

Election of Remedies:

As waiver of right of action, see CORPORATIONS, 6.

By injured workman, see MASTER AND SERVANT, 2.

1. ELECTION OF REMEDIES (3)—ACTS CONSTITUTING ELECTION—MISTAKE IN REMEDY. The resort to the mistaken remedy of action for breach of warranty on the conditional sale of an article does not constitute an election of remedies precluding the buyer from pursuing a proper remedy for damages for fraud. *Warren v. Sheane Auto Co.* 213

Elections:

Review of mandamus directing calling of school election, see CERTIORARI.

Trial of title to office, see QUO WARRANTO.

To authorize free text books to pupils, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

1. ELECTIONS (11)—SCHOOL ELECTIONS—NOTICE OF ELECTION. Under Laws 1921, p. 179, which supersedes the general school election law (Rem. Code, §§4657-4663) the clerks of school districts in class "A" counties and counties of the first class are neither required nor authorized to give notice of school elections, that duty being reposed in a board composed of the chairman of the board of county commissioners, the county auditor and the prosecuting attorney. *State ex rel. Carpenter v. Superior Court*..... 664
2. SAME (12)—ELECTION PRECINCTS—BOUNDARIES. The fact that boundaries of a school district are not coincident with boundaries of election districts as duly established in a county does not render the result of a school election uncertain, inasmuch as the qualification of the voter as a resident of the school district may be tested by the election officers. *State ex rel. Carpenter v. Superior Court* 664
3. SAME (31)—BALLOTS—STATEMENT OF QUESTIONS SUBMITTED. Under Laws 1921, p. 181, § 5, it is made the duty of the chairman of the board of county commissioners, the county auditor and the prosecuting attorney, to place upon the school election ballot in appropriate form, not only the question of officers, but also any other proposition which the officers of the district are authorized to sub-

Elections—Continued.

mit to the voters, when advised in some appropriate official manner by the proper officers of the school district. *State ex rel. Carpenter v. Superior Court*..... 664

4. **ELECTIONS (46)—VOTES—CANVASS—OFFICERS—CUSTODY OF RETURNS.** Laws 1921, p. 181, § 5, providing that election officers in school districts in class "A" counties and counties of the first class shall count the ballots and make return to the proper officers of the districts is not unworkable and uncertain because of failure to provide for the canvassing of votes by a canvassing board, since the count and canvass of votes by the precinct election officers and their return to the custody of the proper officers of the district establishes a complete record of the votes from which the result of the election can be determined by computation. *State ex rel. Carpenter v. Superior Court* 664

5. **SAME (46).** The board of directors of a school district being the custodian of its records and papers, a return by election precinct officers of votes cast in a school election in class "A" and first class counties should be deposited with the clerk of the school board, under Laws 1921, p. 179, which supersedes the provisions of the general school election law in those two classes of counties. *State ex rel. Carpenter v. Superior Court*..... 664

6. **SAME (47)—CANVASS—POWERS OF OFFICERS.** An officer or body authorized to canvass election returns performs only a ministerial duty in summing them up and declaring the result, unless the statute expressly gives such officers some additional power. *State ex rel. Carpenter v. Superior Court*..... 664

Electricity:

Contracts for power and light, see **CONTRACTS**, 1.

Damages for breach of contract to furnish power and light, see **DAMAGES**, 3, 4.

1. **ELECTRICITY (1, 3)—STATUTORY CONTROL—CONTRACTS FOR POWER AND LIGHT—VALIDITY—DISCRIMINATIONS.** A contract by a public service corporation to furnish power for driving mill machinery, electric light for the mill plant, steam heat for its dry kilns, and make repairs to its machinery, in consideration for the transfer by the mill company of its steam plant which was to be used for generating electricity, does not constitute a public service contract, the contract being one for private service, before the dedication of any service to the public. *Sunset Shingle Co. v. Northwest Electric & Water Works*..... 416

2. **ELECTRICITY (1, 3)—STATUTORY CONTROL—CONTRACTS FOR POWER—VALIDITY.** In a contract calling for the furnishing of fuel to operate a steam plant for the generation of electricity in exchange for electric light and power so generated, a provision that the

Electricity—Continued.

parties shall render monthly bills to one another for such services, charging an equal amount therefor, is not an admission by the parties that the furnishing of the electricity is a public service, but shows rather the intent of the parties that the contract should not fall within the regulatory provisions of the public service statutes. *Sunset Shingle Co. v. Northwest Electric & Water Works* 416

Eminent Domain:

1. EMINENT DOMAIN (21, 39)—PUBLIC USE—CONFLICTING CLAIMS—PRIORITIES—PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. The court may determine that the use of the waters of a river by an irrigation company for irrigating a large quantity of arid land, and for the development of power necessary to its irrigation scheme, is superior to the use of such waters by a city for merely power purposes in the distribution of water to its inhabitants apart from domestic and city purposes, there being no showing by the city of a necessity for the use of the river waters for domestic purposes, in view of the rule prescribed by Laws 1917, p. 448, § 4, that "in condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one;" especially where the irrigation use was prior in time. *State ex rel. Kennewick Irrigation District v. Superior Court* 517
2. SAME (111)—PROCEEDINGS — PARTIES — RIGHTS OF INTERVENERS. Where condemnation proceedings are instituted by an irrigation district against a power company for the purpose of establishing a superior use in the waters of a certain river, a city has no right to intervene therein for the purpose of securing an adjudication upon the city's right to condemn, as against the power company, property other than that involved in the proceeding by the irrigation company. *State ex rel. Kennewick Irrigation District v. Superior Court* 517
3. EMINENT DOMAIN (116)—PROCEEDINGS—NOTICE—PROOF OF SERVICE—AFFIDAVITS—SUFFICIENCY. Rem. Code, § 5633, providing notice of proceedings to condemn land to be posted, in case of absentee owners, "at a conspicuous place on the lands," is shown to be strictly complied with by an affidavit of posting "at a conspicuous place on the lands to be affected by said road." *State ex rel. Cation v. Superior Court*..... 217

Employees:

See MASTER AND SERVANT.

Enactment:

Of statutes, see STATUTES, 1.

Equitable Assignments:

See ASSIGNMENTS, 1.

Equity:

See CANCELLATION OF INSTRUMENTS; FRAUDULENT CONVEYANCES; INTERPLEADER; SPECIFIC PERFORMANCE; TRUSTS.

Equitable assignment, see ASSIGNMENTS, 1.

Laches as bar to vacation of settlement by guardian with ward, see GUARDIAN AND WARD, 3.

Relief against judgment, see JUDGMENT, 1.

Establishment:

Of drains, see DRAINS.

Of oral gift in lands, see GIFTS.

Of trusts, see TRUSTS.

Estates:

Decedents' estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

Estimates:

Cost of drainage improvement, see DRAINS, 5.

Estoppel:

Right to raise question for first time on appeal, see APPEAL AND ERROR, 2-4.

To allege error in civil actions, see APPEAL AND ERROR, 8-10.

To allege invalidity of stock issued, see CORPORATIONS, 2-4.

By election of remedy, see ELECTION OF REMEDIES.

By judgment, see JUDGMENT, 3.

To resist lien, see MECHANICS' LIENS, 2.

To assert title to goods sold, see SALES, 10.

Evidence:

Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 5-7.

Harmless error on appeal, see APPEAL AND ERROR, 21.

For attorney's fee, see ATTORNEY AND CLIENT, 4.

On bill or note, see BILLS AND NOTES, 2, 3.

For compensation of brokers, see BROKERS, 4.

Against carrier for loss of or injury to goods, see CARRIERS, 10, 11.

Of agreement of parties to contract, see CONTRACTS, 2.

Proof of capacity of corporation to sue, see CORPORATIONS, 9.

In criminal prosecutions, see CRIMINAL LAW, 3-6, 11.

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 11; NEW TRIAL, 2-4.

For damages for breach of contract, see DAMAGES, 5, 7, 8.

Delivery of deed, see DEEDS.

Evidence—Continued.

Depositions, see DEPOSITIONS.

Discovery of evidence, see DISCOVERY.

In suit for divorce, see DIVORCE, 1, 2.

Condemnation proceedings, see EMINENT DOMAIN, 1, 3.

Proof of oral agreement relating to real property, see FRAUDS, STATUTE OF, 2, 3.

To establish parol gift of land, see GIFTS.

Of good faith in dealing with ward, see GUARDIAN AND WARD, 2.

Negligent use of highways, see HIGHWAYS.

Of assault with intent to kill, see HOMICIDE, 1.

Separate property of married woman, see HUSBAND AND WIFE, 1.

Of criminal syndicalism, see INSURRECTION, 1.

In prosecution for unlawful possession of liquor, see INTOXICATING LIQUORS, 3, 6.

Abandonment of lease by tenant, see LANDLORD AND TENANT, 2.

In action by lessee for possession, see LANDLORD AND TENANT, 3.

In prosecution for larceny, see LARCENY.

Violation of ordinance prohibiting sale of property by chance, see LOTTERIES.

Scope of employment, see MASTER AND SERVANT, 3.

For injuries to servant or third person, see MASTER AND SERVANT, 3.

Extension of maturity of debt, see MORTGAGES.

For injuries in streets, see MUNICIPAL CORPORATIONS, 21-23.

New trial for insufficiency of evidence, see NEW TRIAL, 1.

Authority of agent, see PRINCIPAL AND AGENT, 1.

Fraud of obligee under building contractor's bond, see PRINCIPAL AND SURETY, 2, 3.

Negligence causing injuries to persons at crossings, see RAILROADS, 1-6.

Transfer of title by contract of sale, see SALES, 8.

For specific performance of contracts, see SPECIFIC PERFORMANCE, 1, 3.

For injuries to persons on or near tracks, see STREET RAILROADS.

Of excessive assessment, see TAXATION, 3.

Sufficiency of tender, see TENDER.

Reception at trial, see TRIAL, 2.

Applicability of instructions to evidence, see TRIAL, 5.

To establish and enforce trust, see TRUSTS.

Good faith of purchaser, see VENDOR AND PURCHASER, 4.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE (1)—JUDICIAL NOTICE—BY APPELLATE COURT. On appeal from a police court on a prosecution for the violation of a city ordinance of which judicial notice is taken by the police court, such ordinance is equally within the judicial knowledge of the superior court to which the appeal is taken. *Olympia v. Nickert*..... 407

Evidence—Continued.

2. EVIDENCE (10)—JUDICIAL NOTICE—ORDINANCES. A city police court may take judicial notice of an ordinance whose violation is charged against defendant without the complaint setting out the ordinance other than by its number. *Olympia v. Nickert*..... 407
3. EVIDENCE (86)—ADMISSIONS—OFFER OF COMPROMISE. Evidence tending to support an actual compromise and settlement is not within the rule which does not permit evidence of an offer of compromise. *Smith v. Telford*..... 502
4. EVIDENCE (105)—HEARSAY. In an action to recover for an overpayment of freight charges, testimony by plaintiff of statements made to him by his bookkeeper is inadmissible as hearsay. *Lincoln v. Kuskokwim Fishing & Transportation Co.*..... 137
5. EVIDENCE (128)—DOCUMENTARY EVIDENCE—MEMORANDA. Ledger entries are not admissible to prove an account stated, such book not being one of original entry, where there was no evidence showing the method of keeping the ledger when the entries were made nor by whom made. *Lincoln v. Kuskokwim Fishing & Transportation Co.* 137
6. EVIDENCE (142)—PAROL EVIDENCE TO VARY WRITINGS—PUBLIC RECORDS. In condemnation proceedings to establish a public highway, where there are in evidence two purported orders of the county commissioners for the establishment of the road, oral evidence is admissible to show that one of them had not been adopted. *State ex rel. Cation v. Superior Court*..... 217
7. EVIDENCE (149)—PAROL EVIDENCE TO VARY WRITING—SALE OF CHATTELS. Where orders for trucks and trailers provided that, at time of delivery, conditional sales contracts were to be executed and that no verbal agreement would be recognized, it must be presumed that the conditional sales contracts entered into contained all the elements of the contracts, and they could not be varied by alleged oral agreements as to equipment and time and place of delivery. *White v. Little Co.*..... 582
8. EVIDENCE (156)—PAROL EVIDENCE TO VARY WRITING—PARTIES TO INSTRUMENT. Where a corporation entered into a written contract to sell the fruit of its stockholders, the contract cannot be varied by oral evidence that it was intended to bind the stockholders individually. *Barnett Bros. v. Lynn*..... 308
9. EVIDENCE (174, 179)—TO VARY WRITING—CONSTRUCTION OF CONTRACT—INTENT—EXTRINSIC EVIDENCE. Under a contract for the sale and manufacture of apple boxes, with a provision making it "subject to fires," oral evidence is admissible, in an action to recover damages for the nondelivery of the boxes "to be manufactured," to show that the buyer knew when he entered into the contract that

Evidence—Continued.

the seller had but one plant, which was subsequently destroyed by fire before full delivery could be made. *Leavenworth State Bank v. Cashmere Apple Co.*..... 356

Examination:

Of applicant to practice law, see ATTORNEY AND CLIENT, 2.

Physical examination of party, see DISCOVERY.

Of witnesses in general, see WITNESSES.

Exceptions:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 2-4.

Excessive Assessment:

See MUNICIPAL CORPORATIONS, 14; TAXATION, 1-3.

Excessive Damages:

For breach of contract, see DAMAGES, 6.

For negligence in causing death, see DEATH, 3.

Excuse:

For failure to deliver, see SALES, 2.

Execution:

See ATTACHMENT.

Of note as accommodation maker, see BILLS AND NOTES, 1, 3.

Of deed in blank, see DEEDS, 1.

Collateral attack on judgment, see JUDGMENT, 1.

Of bond by co-surety, see PRINCIPAL AND SURETY, 1.

Stipulations as to issuance of, see STIPULATIONS.

1. EXECUTION (5)—PROPERTY SUBJECT—PERSONAL PROPERTY—INTEREST IN PUBLIC LANDS. A locator's interest in an unpatented mining claim is personalty rather than realty, and hence capable of sale under execution as personal property. *Huffman v. Ellen Mining Co.* 546

Executors and Administrators:

Right to sue for causing death of decedent, see DEATH, 1, 2.

Discovery of fraud by heir as affecting limitation of action to recover interest in estate, see LIMITATION OF ACTIONS.

1. EXECUTORS AND ADMINISTRATORS (45, 56)—MANAGEMENT OF ESTATE—PLEDGE OF PROPERTY—POWERS OF EXECUTOR—STATUTES. Under Rem. Code, § 1491, declaring that the property of a decedent's estate shall not be sold or mortgaged except by an order of the court, the personal representative of an estate has no authority to pledge the choses in action of the estate as collateral security without having

Executors and Administrators—Continued.

- obtained a court order therefor, and hence the pledgee can obtain no rights in such collateral. *Harden v. State Bank of Goldendale*.. 234
2. SAME (45)—PLEDGE OF PROPERTY—LIABILITY OF PLEDGEE. Where an executor pledges to a bank to secure his personal debt a note belonging to the estate, and the bank on collecting the note applies a part of the proceeds to the individual checking account of the executor, the bank is liable to the estate for any loss suffered through the misapplication of such moneys. *Harden v. State Bank of Goldendale* 234
3. EXECUTORS AND ADMINISTRATORS (78, 79)—CLAIMS—TIME FOR PRESENTATION—STATUTES—CONSTRUCTION. Laws 1917, p. 672, § 107, barring claims against a decedent's estate unless filed with the clerk of the court within six months after service on the personal representative, does not apply to estates in course of administration prior to the passage of the probate code of 1917. *Swan v. Dillabough* 132
4. EXECUTORS AND ADMINISTRATORS (88)—COURTS (51)—PROBATE JURISDICTION—CLAIMS—TITLE TO PROPERTY. Where, in the matter of the distribution of a decedent's estate, the jurisdiction of the superior court, sitting in probate, had been invoked to determine the question of the good faith of a deed from one beneficiary to his wife, under the consent of the parties, all of whom were before the court and the issues had been made up between them, the one invoking the action of the court cannot object that it was without jurisdiction to determine the issue. *In re Stoops' Estate*..... 153
5. EXECUTORS AND ADMINISTRATORS (134)—SALE—VALIDITY—PARTIES ENTITLED TO PURCHASE—ADMINISTRATRIX. An administratrix of an estate stands in a fiduciary relation to those beneficially interested, and whether an unauthorized sale is void or voidable, is not material, where other interests have not intervened, and, irrespective of her own good faith, the administratrix is subject to the rule that a trustee is bound to do that which will best serve the interests which for the time are intrusted to her care. *de la Pole v. Lindley* 387
6. EXECUTORS AND ADMINISTRATORS (149)—ACTIONS BY HEIRS—LIMITATION. Where an heir of one-half of her father's estate joins with her mother, after attaining legal age, in a deed to a tract of land in which she has a half interest, without demanding her share of the purchase price, she cannot, after the bar of the statutory period of limitation, assert a right of action against her mother's estate for her portion of the purchase price appropriated by the mother. *de la Pole v. Lindley*..... 387

Exemptions:

- Of rights in public lands, see PUBLIC LANDS.
- From taxation, see TAXATION, 4.

Expert Testimony:

In criminal prosecutions, see **CRIMINAL LAW**, 5.

Extension:

Of time for payment as defense, see **MORTGAGES**.

False Representations:

See **FRAUD**.

Fees:

Attorney, see **ATTORNEY AND CLIENT**, 4.

Of attorney on foreclosure of mortgage, see **COSTS**, 2.

Ferries:

Operation by port district, see **MUNICIPAL CORPORATIONS**, 1, 2.

Filing:

Claims against receiver, see **CORPORATIONS**, 12, 13.

Claim against decedent's estate, see **EXECUTORS AND ADMINISTRATORS**, 3.

Objections to assessment for improvement, see **MUNICIPAL CORPORATIONS**, 11.

Return of sale for delinquent irrigation tax, see **WATERS AND WATER COURSES**, 7.

Final Orders:

Review on appeal, see **APPEAL AND ERROR**, 1.

Findings:

To support decree in absence of statement of facts, see **APPEAL AND ERROR**, 7.

Review on appeal or writ of error, see **APPEAL AND ERROR**, 13-18.

Fire Insurance:

See **INSURANCE**.

Fixtures:

1. **FIXTURES (9) — BETWEEN VENDOR AND PURCHASER — INTENT IN MAKING ANNEXATION—EVIDENCE—SUFFICIENCY.** Machinery and appliances annexed to a mine by the owner for the purpose of its development and operation pass to the purchaser as part of the realty upon a sale of the mine "together with all improvements;" and where such property is mortgaged back to the vendor to secure a purchase-money mortgage, an attaching creditor of the mortgagor can acquire no lien on such mining equipment and machinery as is shown by the intent of the parties to have been annexed to the mine as a part of the realty. *Reeder v. Hudson Consolidated Mines Co.* 505

Fixtures—Continued.

2. SAME (9). Where the owner of mining claims had annexed to the property for the purpose of development of the mine a quartz mill with its necessary machinery, an electric transformer, an electric motor, and "T" rails attached to the premises, on his sale of the mine with a mortgage back covering the claims "together with all improvements," an attaching creditor of the mortgagor could acquire no lien against such annexed property on the theory they were merely trade fixtures, since the intent of the vendor and his grantee is apparent that the equipment was treated as part of the realty. *Reeder v. Hudson Consolidated Mines Co.*..... 505

Foreclosure:

Of mortgage, see MORTGAGES.

Foreign Corporations:

Service of process on agent of, see CORPORATIONS, 14.

Forfeiture:

Of insurance policies, see INSURANCE.

Of contract for nonpayment of installments, see VENDOR AND PURCHASER, 2.

Forgery:

Evidence of other offenses, see CRIMINAL LAW, 4.

Former Adjudication:

As bar to action, see JUDGMENT, 3.

Franchise:

Grant of by city, see MUNICIPAL CORPORATIONS, 3.

Fraud:

As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.

In settlement with guardian, see GUARDIAN AND WARD, 2.

Effect on limitation, see LIMITATION OF ACTIONS.

Of agent, see PRINCIPAL AND AGENT, 2.

Of obligee as affecting liability of surety, see PRINCIPAL AND SURETY, 2, 3.

Of lessee of boat, see SHIPPING, 1.

1. FRAUD (9)—SALES (107)—IMPLIED WARRANTY—SECOND-HAND MACHINERY. Though there may be no implied warranty on the sale of a second-hand article, one who makes false and fraudulent representations inducing its sale cannot escape liability for the fraud. *Warren v. Sheane Auto Co.*..... 213
2. FRAUD (13)—ACTIONS—PLEADING—COMPLAINT. An action for damages based upon false and fraudulent representations inducing

Fraud—Continued.

the sale of a motor truck, is not based upon a warranty, express or implied, and may be maintained regardless of the vesting of title, or knowledge of the falsity of the representations. *Warren v. Sheane Auto Co.*..... 213

Frauds, Statute of:

Specific performance of oral contracts partly performed, see SPECIFIC PERFORMANCE, 1, 3.

1. FRAUDS, STATUTE OF (1)—PROMISE TO PAY DEBT OF ANOTHER. An oral promise by a stockholder of a corporation to become personally liable for its debts beyond the extent to which he stands liable under the law, being a promise to answer for the debt, default or miscarriage of another, is unenforceable within the statute of frauds. *Barnett Bros. v. Lynn*..... 308
2. FRAUDS, STATUTE OF (42)—SPECIFIC PERFORMANCE (51)—ORAL AGREEMENT TO CONVEY LAND—EVIDENCE—SUFFICIENCY. An oral agreement to convey land, partly performed, need not be shown by proof that removes all uncertainty, but it is sufficient if, from the whole evidence, even if conflicting, the contract can be determined with reasonable certainty. *Herren v. Herren*..... 56
3. FRAUDS, STATUTE OF (59)—EVIDENCE—SUFFICIENCY. While an oral gift or agreement concerning an interest in real estate may be proved under certain circumstances, the agreement must be established by clear, convincing, unequivocal and definite testimony. *Vaut v. Vaut*..... 221

Fraudulent Conveyances:

1. FRAUDULENT CONVEYANCES (14)—SALES IN BULK—WHAT CONSTITUTES. Under Rem. Code, § 5299, a sale of a one-half interest in a business and stock of goods constitutes a sale in bulk. *Spokane Merchants Association v. Koska*..... 445
2. SAME (14)—AFFIDAVIT AS TO CREDITORS—LIABILITY OF PURCHASER. A purchaser of a one-half interest in a business and stock of goods, by exacting the affidavit as to creditors required by Rem. Code, § 5296, is not thereby excused from compliance with the mandate of Id., § 5297, requiring the vendee to see that his purchase money for the half-interest is applied, share and share alike, to the payment of bona fide claims against his vendor as shown by the verified statement of creditors. *Spokane Merchants Association v. Koska* 445
3. SAME (14). A purchaser of an interest in a business is liable under the bulk sales law, for debts listed in his vendor's affidavit, but only to the extent of a pro rata part to each creditor of the amount received by the purchaser from the sale. *Spokane Merchants Association v. Koska*..... 445

Garbage:

Municipal regulations as to removal of garbage, see MUNICIPAL CORPORATIONS, 3-5, 7, 16.

Garnishment:

Against foreign corporation, see CORPORATIONS, 14.

General Denial:

See PLEADING, 1.

Gifts:

Charitable gifts, see CHARITIES.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 3.

Oral gift of lands, see SPECIFIC PERFORMANCE, 3.

1. GIFTS (8)—EVIDENCE—WEIGHT AND SUFFICIENCY. An oral gift of a life estate in land by a son to his parents is not established by evidence showing that he purchased, and put them in possession of, the land with the idea of furnishing them a home, where there is no satisfactory evidence that it was the son's intention to grant them the exclusive possession during their natural lives. *Vaut v. Vaut* 221

Good Faith:

Of purchaser of land, see VENDOR AND PURCHASER, 4.

Governmental Powers:

Of port district, see MUNICIPAL CORPORATIONS, 1, 2.

Grants:

Implied grants, see EASEMENTS.

Guaranty:

See PRINCIPAL AND SURETY.

Guardian and Ward:

1. GUARDIAN AND WARD (20)—ACCOUNTING—ORDER OF COURT—NECESSITY. A settlement between a guardian and ward after the latter attains his majority, made without an order of court, amounts to a legal discharge of the guardian, when made without fraud or abuse of the guardian's position of influence over the ward. *Pickard v. Webb* 244
2. SAME (24)—ACCOUNTING—FRAUD—EVIDENCE—SUFFICIENCY. The burden of showing perfect good faith incumbent on a guardian in dealing with a ward is sustained by evidence showing a full, fair and complete understanding of the ward at the time of a settlement between them after the ward had attained his majority. *Pickard v. Webb* 244

Guardian and Ward—Continued.

3. SAME (24). Where a ward, at the time of an accounting and settlement between him and his guardian, has knowledge of facts sufficient to put him on inquiry as to his rights, his delay of eight years in commencing suit to set aside the settlement constitutes such laches as to give him no standing in a court of equity. *Pickard v. Webb* 244

Habeas Corpus:

1. HABEAS CORPUS (19)—PARTICULAR ISSUES—CUSTODY OF CHILD. A parent who has granted the care and custody of a minor child to another under a void contract is entitled to its return under writ of habeas corpus, where there is satisfactory evidence of his ability, willingness and qualification to properly care for and rear the child. *In re Smith*..... 1

Harmless Error:

In civil actions, see APPEAL AND ERROR, 19-24.

Headnotes:

As element in construction of statute, see STATUTES, 2, 3.

Health:

Municipal ordinances providing precautions against disease, see MUNICIPAL CORPORATIONS, 16.

Hearing:

Before county board for improvement of consolidated district, see DRAINS, 4.

Hearsay:

In civil actions, see EVIDENCE, 4.

Heirs:

Recovery of mesne profits of estate, see DESCENT AND DISTRIBUTION.
Action to recover interest in estate, see EXECUTORS AND ADMINISTRATORS, 6.

Highways:

Notice of contract for improvement, see COUNTIES.

Accidents at railroad crossings, see RAILROADS.

1. HIGHWAYS (52, 57)—AUTOMOBILES—NEGLIGENT USE—EVIDENCE—SUFFICIENCY. In an action for injuries to plaintiff's automobile as the result of a rear-end collision on a public highway, the findings of the trial court are sustained by proof that plaintiff's car was bumped into while all its lights were burning, and while traveling on a straight road, in view of the circumstances that defendant, if traveling at the moderate rate of speed testified to, could have seen plaintiff's car in time to have stopped. *Parsons v. Hamrick*.... 305

Homicide:

1. **HOMICIDE (10)—ASSAULT WITH INTENT TO KILL—EVIDENCE—SUFFICIENCY.** A conviction of the crime of assault in the first degree is sustained by evidence that defendant borrowed a shot gun after endeavoring in five different places to secure one; that he sought out the prosecuting witness, and, finding him at home on his front porch, fired at him from a distance of seventy-two to ninety-seven feet, with a load of bird shot which lodged in the arm and hip of his victim. *State v. Hart*..... 114
2. **SAME (14-18)—JUSTIFIABLE HOMICIDE—SELF-DEFENSE—DUTY OF DEFENDANT.** A person on his own premises may defend himself from an unprovoked assault with any means within his command even to taking the life of his assailant, if the assault is of such a nature as to cause him reasonably to believe that he is in danger of his life or of great bodily harm. *State v. Rader*..... 198
3. **SAME (110, 111-1)—JUSTIFIABLE HOMICIDE—INSTRUCTIONS—MISLEADING INSTRUCTIONS.** In a prosecution for homicide where there was no evidence that the deceased had endeavored to withdraw from the fight, nor that the killing was done through motives of anger or fear after a change of circumstances had freed the defendant from danger, an instruction that under such circumstances the killing was not justifiable was misleading and erroneous, as assuming facts not in the case. *State v. Rader*..... 198
4. **HOMICIDE (110-112)—TRIAL—INSTRUCTIONS—JUSTIFICATION.** In a prosecution for homicide, where the defense was that the act was justifiable, the omission by the court of the element of justification in its charge to the jury defining the degrees of murder was error, notwithstanding an attempt in later instructions to define justifiable homicide. *State v. Rader*..... 198
5. **SAME (121)—TRIAL—INSTRUCTIONS—GRADE OR DEGREE OF OFFENSE—NECESSITY.** In a prosecution for murder in the first degree, it is error to refuse a requested instruction in the language of Rem. Code, § 2308, that where an offense has been proved against a person and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest; and the same is not cured by a verdict of second degree murder, since manslaughter is a degree within the crime of murder. *State v. Rader* 198

Husband and Wife:

Divorce and judicial separation, see **DIVORCE**.

1. **HUSBAND AND WIFE (19, 58, 60)—WIFE'S SEPARATE ESTATE—PURCHASE BY WIFE—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY.** Where land is purchased by a wife with her separate funds, its status as her separate property remains as fixed until changed by

Husband and Wife—Continued.

- deed, due process of law, or some form of estoppel. *In re Sanderson's Estate* 250
2. HUSBAND AND WIFE (58)—COMMUNITY PROPERTY—PROPERTY ACQUIRED DURING MARRIAGE—PRESUMPTIONS. Property acquired by spouses during the marital relation is presumptively community property, but this presumption is a rebuttable one. *In re Sanderson's Estate* 250
3. HUSBAND AND WIFE (64, 67)—COMMUNITY PROPERTY—CONVEYANCE OR SALE BY HUSBAND. An oral promise by one spouse to convey property cannot be enforced against the other spouse who did not join therein. *Herren v. Herren*..... 56
4. HUSBAND AND WIFE (82)—COMMUNITY PROPERTY—DEBT OF HUSBAND—BILLS AND NOTES. A promissory note given by a husband to promote the financial welfare of a canning company in which he is interested, thereby redounding to the benefit of the community, is a community obligation. *Kuhn v. Groll*..... 285
5. HUSBAND AND WIFE (84)—COMMUNITY PROPERTY—LIABILITY OF WIFE—IMPLIED CONTRACT. Where money of a corporation is applied by an agent to the wrongful payment of his private debt to a married woman, her liability for the repayment of the money to the corporation arises on an implied contract for money had and received, and not for a tort, and the community of husband and wife is liable therefor. *Farmers Market v. Austin*..... 103
6. HUSBAND AND WIFE (108)—SEPARATE MAINTENANCE—TEMPORARY ALLOWANCE AND SUIT MONEY—EFFECT OF APPEAL. Although a judgment for separate maintenance of a wife and children has been superseded pending appeal, the superior court still retains jurisdiction after such judgment to compel the husband to pay for her separate maintenance during appeal, notwithstanding the supersedeas, and to order the payment by the husband of suit money for the preparation of her case on appeal. *State ex rel. Buttnick v. Superior Court* 604
7. SAME (108)—SEPARATE MAINTENANCE—SUIT MONEY—DENIAL OF MARRIAGE—APPEAL—PRESUMPTIONS. The denial of the existence of a legal marriage relation between parties will not defeat the right of the alleged wife to an allowance for maintenance and suit money pending an appeal from a judgment awarding her separate maintenance, where the trial court has found that there was a valid marriage between the parties. *State ex rel. Buttnick v. Superior Court* 604

Impeachment:

Of witnesses, see WITNESSES, 2.

Implication:

Creation of easement, see EASEMENTS.

Implied Warranty:

On sale of property, see FRAUD.

Improvements:

By drainage district, see DRAINS.

Liens, see MECHANICS' LIENS; MINES AND MINERALS.

Public improvements, see MUNICIPAL CORPORATIONS, 8-15.

Incumbrances:

See MORTGAGES.

Indemnity:

Contracts of suretyship, see PRINCIPAL AND SURETY.

Indictment and Information:

Preliminary complaints, see CRIMINAL LAW, 2.

Indorsement:

Of bill of lading, see CARRIERS, 6-9.

Industrial Insurance:

See MASTER AND SERVANT, 2.

Infants:

See GUARDIAN AND WARD.

Right of action for wrongful death of infant, see DEATH, 1, 2.

Determination as to custody of child, see HABEAS CORPUS.

Rights, duties and liabilities of parents and children incident to the relation, see PARENT AND CHILD.

Inheritance Tax:

See TAXATION, 4.

Injunction:

To compel operation of ferries, see MUNICIPAL CORPORATIONS, 2.

To prevent school board from selling school books, see SCHOOLS AND SCHOOL DISTRICTS, 3.

Interference with water rights, see WATERS AND WATER COURSES, 1.

Insolvency:

Of corporation, see CORPORATIONS, 12, 13.

Instructions:

Review as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 4.

Presumption on appeal, see APPEAL AND ERROR, 11.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 22-24.

Instructions—Continued.

In criminal prosecutions, see **CRIMINAL LAW**, 6-8; **HOMICIDE**, 3-5; **LARCENY**, 4; **INTOXICATING LIQUORS**, 7.

In prosecution for criminal syndicalism, see **INSURRECTION**, 2.

In civil actions, see **TRIAL**, 4-9.

Insurance:

1. **INSURANCE (91) — FIRE INSURANCE — FORFEITURE OF POLICY — CHANGE OF TITLE OR INTEREST.** A policy of fire insurance is avoided by a sale of the property without the consent of the insurance company, where consent of the company is imposed in the policy as a condition to the continuance of insurance upon a transfer of the property. *Menger v. Inland Empire Farmers' Mutual Life Insurance Co.* 514
2. **SAME (35, 91)—CONTRACTS (41)—VALIDITY—PUBLIC POLICY.** A contract of fire insurance making it invalid upon a transfer of the property insured, unless the consent of the company be indorsed upon the policy, is not void as against public policy. *Menger v. Inland Empire Farmers' Mutual Life Insurance Co.*..... 514

Insurrection:

1. **INSURRECTION—CRIMINAL SYNDICALISM—EVIDENCE—MEMBERSHIP IN I. W. W.** The act of a member of the Industrial Workers of the World in inciting others to join the organization is in the nature of giving aid to such organization, within the prohibition of Laws 1919, p. 518, against criminal syndicalism. *State v. Aspelin*..... 331
2. **SAME—INSTRUCTIONS — SEDITION—DEFINITION.** In a prosecution for criminal syndicalism based on the act of defendant in inciting others to join the Industrial Workers of the World, it was prejudicial error for the court to charge the jury that "the term 'sedition' means to speak or to write against the character and constitution of the government or to seek to change it by any means except those prescribed by law;" in view of the fact that the offense of sedition under the syndicalism statute does not include theoretical discussion. *State v. Aspelin*..... 331

Intent:

Evidence of other offenses to show intent, see **CRIMINAL LAW**, 4.

Affecting annexation of chattels to realty, see **FIXTURES**.

Felonious intent, sufficiency of evidence, see **LARCENY**, 3.

To pass title to goods, see **SALES**, 8.

Of legislature as element in construction of statutes, see **STATUTES**, 3.

Interest:

Penalty for nonpayment of tax, see **TAXATION**, 1.

Interpleader:

1. **INTERPLEADER (5)—JUDGMENT.** One who is not an original defendant cannot complain that judgment is rendered against him,

Interpleader—Continued.

where he voluntarily intervenes in the action, makes a defense, and seeks affirmative relief against the plaintiff. *Leavenworth State Bank v. Wenatchee Valley Fruit Exchange*..... 366

Intervention:

See INTERPLEADER.

In condemnation proceedings, see EMINENT DOMAIN, 2.

Intoxicating Liquors:

Merger of offenses, see CRIMINAL LAW, 1.

Punishment for subsequent offenses, see CRIMINAL LAW, 13, 14.

Construction of statute relating to intoxication of driver of animal or vehicle on public highway or street, see STATUTES, 3.

1. INTOXICATING LIQUORS (6)—PROHIBITION—UNLAWFUL POSSESSION—STATUTES—EIGHTEENTH AMENDMENT. Initiative measure No. 3, as amended by Laws 1917, p. 60, § 11, providing that it shall be unlawful for any person to have in his possession any intoxicating liquor is not nugatory as in conflict with the Federal statute (41 Stat. L., p. 317, § 33) declaring "it shall not be unlawful to possess liquors in one's private dwelling"; inasmuch as the state statute covers the offense of possession away from one's dwelling, and is not superseded by the national law except in so far as it is in conflict therewith. *State v. Gibbons*..... 171
2. SAME (6) — PROHIBITION — UNLAWFUL POSSESSION — EIGHTEENTH AMENDMENT. The eighteenth amendment and the Volstead Act have not superseded the state laws making possession of intoxicating liquors unlawful. *State v. Cole*..... 511
3. INTOXICATING LIQUORS (30, 49)—UNLAWFUL POSSESSION—PRIOR CONVICTIONS—EVIDENCE—ADMISSIBILITY. Laws 1917, p. 61, § 15, amending initiative measure No. 3, increasing the punishment for a second violation of the liquor prohibition law, and declaring that a certified record of conviction "shall be sufficient evidence and proof of such previous conviction," is not unconstitutional as an attempt to make such certified record conclusive proof, where it is merely introduced as an evidentiary fact, which the jury are free to weigh as such. *State v. Gibbons*..... 171
4. SAME (31)—OFFENSES—JOINTIST. An actual sale of intoxicating liquor is not essential to the crime of being a jointist. *State v. Cole* 511
5. SAME (42)—OFFENSES—UNLAWFUL POSSESSION—COMPLAINT—SUFFICIENCY. A complaint charging that defendant "had in his possession intoxicating liquor other than alcohol," without stating the nature of such liquor nor that it was capable of being used as a beverage, was insufficient in that it did not apprise defendant of the crime with which he was charged. *State v. Catalino*..... 611

Intoxicating Liquors—Continued.

6. **INTOXICATING LIQUORS (49)—OFFENSES—UNLAWFUL POSSESSION—EVIDENCE—ADMISSIBILITY.** In a prosecution for the illegal possession of intoxicating liquor, evidence of which had been obtained by means of a search warrant, it was error to deny the defendant the right to cross-examine the prosecuting witness as to the validity of the search warrant. *State v. Catalino*..... 611
7. **INTOXICATING LIQUORS (51)—OFFENSES—JOINTIST—PRESUMPTIONS FROM POSSESSION—INSTRUCTIONS.** In a prosecution for being a jointist, an instruction on the presumption of possession from the finding of liquor on the premises of accused was not prejudicial because of the fact that others had access to the place, where the instruction was qualified by the statement that the presumption was rebuttable, and the jury were charged to determine from all the evidence whether defendant had been proved guilty beyond a reasonable doubt. *State v. Cole*..... 511
8. **INTOXICATING LIQUORS (53)—SEIZURES—VALIDITY—AUTHORITY IN ABSENCE OF SEARCH WARRANT.** The seizure without any search warrant of intoxicating liquor in the possession of a person, being in violation of the Federal (amendments 4, 5) and state (art. 1, §§ 7, 9) constitutions, such liquor cannot be produced in evidence against one prosecuted on a charge of having intoxicating liquor in his possession, where the defendant was unlawfully arrested and his automobile seized without any warrant and possession of the liquor was not actually disclosed until examination of defendant's vehicle under a search warrant issued subsequent to his arrest. *State v. Gibbons* 171

Irrigation:

See **WATERS AND WATER COURSES**, 5-7.

Condemnation of waters for, see **EMINENT DOMAIN**.

Quo warranto to determine election of director of irrigation district, see **QUO WARRANTO**.

Issuance:

Of corporate stock, see **CORPORATIONS**, 2, 3.

Joinder:

Of causes of action, see **ACTION**.

Jointist:

Prosecution of offense, see **INTOXICATING LIQUORS**, 4, 7.

Judges:

Mandamus to judge, see **MANDAMUS**.

Judgment:

Review in general, see **APPEAL AND ERROR**.

In interpleader proceedings, see **INTERPLEADER**.

Judgment—Continued.

1. JUDGMENT (163)—COLLATERAL ATTACK—PUBLIC LANDS—EXEMPTIONS—LIABILITY FOR DEBTS. An action by the grantee of an entryman of public land to quiet title as against an execution sale and sheriff's deed to the property, founded on a debt of the entryman prior to patent, is not a collateral attack on the judgment, since the liability of the land to the satisfaction of the judgment was not a question in the action in which the judgment was rendered. *Razzano v. Burcham*..... 142
2. JUDGMENTS (171) — OPERATION AND EFFECT — RECITALS AS TO SERVICES. The recital of the record of the board of county commissioners upon the letting of a public contract that "due notice of same has been given," is *prima facie*, but not conclusive, evidence of sufficiency of statutory publication, and is rebuttable by evidence. *Wyant v. Independent Asphalt Paving Co*..... 345
3. JUDGMENT (213-3) — BAR — MATTERS CONCLUDED — CONTRACTS — SPLITTING CAUSES OF ACTION. A contract for the sale of automobile trucks requiring the purchaser to pay a sum certain in money on a specified date, and also to pay designated accounts or bills then due and owing by the seller, is a divisible one, and judgment in an action to recover the cash payment is not a bar to a subsequent action to recover the amount of the bills and accounts which the purchaser had assumed and agreed to pay as part consideration for the sale. *Helsley v. American Mineral Production Co*..... 571

Judicial Notice:

See EVIDENCE, 1, 2.

Judicial Sales:

Collateral attack on judgment or order of sale, see JUDGMENT, 1.

Jurisdiction:

Appellate jurisdiction in general, see APPEAL AND ERROR, 1.

Of superior court pending appeal, see DIVORCE, 6.

Criminal prosecutions, see CRIMINAL LAW, 2.

For separate maintenance, see HUSBAND AND WIFE, 6, 7.

Want of jurisdiction as ground for writ of prohibition, see PROHIBITION.

Jury:

Affidavits as to misconduct of as part of record on appeal, see APPEAL AND ERROR, 5.

Questions for jury in criminal prosecutions, see CRIMINAL LAW, 6.

Instructions in criminal prosecutions, see CRIMINAL LAW, 6-8.

Verdict in criminal prosecutions, see CRIMINAL LAW, 9.

Misconduct as ground for new trial, see NEW TRIAL, 5.

View of premises in civil action, see TRIAL, 1.

Instructions in civil actions, see TRIAL, 4-9.

Justices of the Peace:

Abandonment of prosecution in justice court and filing complaint charging higher offense, see **CRIMINAL LAW**, 2.

Justification:

Of homicide, see **HOMICIDE**, 2-4.

Knowledge:

Effect of ignorance of cause of action on limitation, see **LIMITATION OF ACTIONS**.

Of facts as affecting liability of surety, see **PRINCIPAL AND SURETY**, 3.

Labor Liens:

On logs, see **LOGS AND LOGGING**.

Laches:

As bar to suit to set aside settlement with ward, see **GUARDIAN AND WARD**, 3.

As affecting limitation of action, see **LIMITATION OF ACTIONS**.

Landlord and Tenant:

Mechanics' lien for improvements by tenant, see **MECHANICS' LIENS**.

1. **LANDLORD AND TENANT (9)—LEASE — CONDITIONAL DELIVERY OF LEASE.** A lease of premises cannot be said to have been conditionally delivered from the fact that the lessee notified the lessor in writing that, in consideration of the delivery of the lease, the lessee would not hold the lessor liable if the present tenants were not out by a given date, but were allowed to remain over a few days longer. *Blanc's Cafe, Incorporated, v. Corey*..... 10
2. **SAME (39-1) — LEASE — ABANDONMENT BY TENANT — WAIVER OF RIGHTS—EVIDENCE—SUFFICIENCY.** A lessee who has been prevented from taking possession of leased premises by reason of restrictive clauses in other leases by the lessor cannot be said to have abandoned the lease, or to be chargeable with laches, where it delayed for eight months in bringing a possessory action for the premises and, on the dismissal of its action without prejudice, waited another six months before instituting action, in view of the fact that the lessee refused to receive back the rents and money deposits made by it and retained the keys to the leased premises. *Blanc's Cafe, Incorporated, v. Corey*..... 10
3. **SAME (52)—ACTION FOR FAILURE TO DELIVER POSSESSION—EVIDENCE—ADMISSIBILITY.** Evidence of the financial condition of a lessee for the purpose of showing its inability to occupy premises leased to it is immaterial in an action by the lessee for possession. *Blanc's Cafe, Incorporated, v. Corey*..... 10
4. **SAME (52, 53)—ACTION FOR POSSESSION—DAMAGES—RECITALS IN JUDGMENT.** The right of a lessee, if any it have, to institute an ac-

Landlord and Tenant—Continued.

tion for damages, following a possessory action against the lessor for the premises, is fully protected by a recital of the judgment in the possessory action that the question of plaintiff's damages was not presented to or considered by the court. *Blanc's Cafe, Incorporated, v. Corey*..... 10

Lands:

See PUBLIC LANDS.

Covenants running with land, see COVENANTS.

Larceny:

Evidence as part of *res gestae*, see CRIMINAL LAW, 3.

1. LARCENY (18)—EVIDENCE—OWNERSHIP OF PROPERTY—STATUTES AS TO RECORDED BRANDS. In a prosecution for the larceny of logs, the owner's mark thereon is admissible for the purpose of proving ownership, though it had never been recorded in compliance with the provisions of Rem. Code, § 7092, since that statute does not restrict evidence of ownership to recorded brands or marks. *State v. Tullock* 496
2. SAME (25-2)—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY. In a prosecution for the larceny of logs, their value is sufficiently proven by evidence of the price obtained on a sale by the one who purloined them. *State v. Tullock*..... 496
3. SAME (28)—TAKING OF PROPERTY—FELONIOUS INTENT—EVIDENCE—SUFFICIENCY. The felonious intent of the finder of logs adrift in taking possession and selling them is sufficiently shown by evidence that the logs had a private brand and that there were no other logs with the same marks, and that the finder had reasonable means of knowing ownership. *State v. Tullock*..... 496
4. LARCENY (39)—TRIAL—INSTRUCTIONS—POSSESSION. An instruction that defendant's possession of stolen property, if the jury so find, is not of itself sufficient to justify a conviction of larceny, but defendant's possession thereof is a circumstance which may be taken in connection with all the other circumstances and facts in the case, is not erroneous in that it did not further state that the possession was personal, not simply constructive. *State v. Humphreys* 472

Law of the Road:

Collision with automobile, see MUNICIPAL CORPORATIONS, 18.

Lawyer:

See ATTORNEY AND CLIENT.

Leases:

See LANDLORD AND TENANT.

Legislature:

Intent as element in construction of laws, see **STATUTES**, 3.

Liens:

On logs, see **LOGS AND LOGGING**.

Mining liens, see **MINES AND MINERALS**.

Limitation:

School district indebtedness, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

Limitation of Actions:

As affecting punishment for subsequent offense, see **CRIMINAL LAW**, 13.

Time for presentation of claims against decedent's estate, see **EXECUTORS AND ADMINISTRATORS**, 3.

By or against executors or administrators, see **EXECUTORS AND ADMINISTRATORS**, 6.

1. **LIMITATION OF ACTIONS (56)—FRAUD—DISCOVERY OF FRAUD.** Where a mother, as administratrix during the minority of her daughter, makes a sale of real estate in which the daughter has a half interest, to herself through the intervention of a third party, and the daughter does not discover the attempted elimination of her own rights until the death of her mother, some nineteen years later, she is not chargeable with laches nor barred by the statute of limitations from seeking a recovery of her interest in the estate. *de la Pole v. Lindley* 387

Liquidated Damages:

See **DAMAGES**, 1, 2.

Provision for in contract as affecting right to specific performance, see **SPECIFIC PERFORMANCE**, 2.

Liquors:

See **INTOXICATING LIQUORS**.

Logs and Logging:

Regulation of charges for by carrier, see **CARRIERS**, 1-5.

Owner's brand as evidence of title, see **LARCENY**, 1.

War contract for spruce lumber, see **UNITED STATES**.

1. **LOGS AND LOGGING (21, 22) — LABOR LIENS — REMEDIES OF LIEN CLAIMANTS—PROPERTY SUBJECT TO LIEN—STATUTES — CONSTRUCTION.** Under Rem. Code, § 1149, giving every person performing labor in the operation of any "sawmill, lumber, or timber company" a prior lien on all the real and personal property of the employer used in the operation of the business, for moneys due for labor performed within six months next preceding the filing of a claim therefor, a laborer's lien for work in logging operations takes precedence over

Logs and Logging—Continued.

- a chattel mortgage of the equipment of a logging company. *Calmer v. Day* 276
2. SAME (21, 22). Rem. Code, § 1162, giving loggers a lien upon the product of their labor, and Id., § 1149, giving laborers a lien upon all the property of the employer used in the operation of the business, afford merely cumulative remedies, requiring no election between them, since they are not inconsistent. *Calmer v. Day*..... 276

Lotteries:

Validity of ordinance relating to, see MUNICIPAL CORPORATIONS, 17.

1. LOTTERIES — VIOLATION OF ORDINANCE — EVIDENCE — SUFFICIENCY. The elements of a lottery consisting of a consideration, a prize, and a chance, a theatre which distributes tickets to its patrons without any extra charge which entitles the holder to a chance for merchandise prizes in a drawing, by lot, is guilty of violating an ordinance prohibiting the sale or disposition of any property by chance, since there is an indirect consideration paid and received in the fact that the prizes attract persons to the theatre who would not otherwise attend. *Society Theatre v. Seattle*..... 258

Machinery:

As fixture, see FIXTURES.

Mailing:

Return of depositions, see DEPOSITIONS.

Maintenance:

Right of wife to allowance for maintenance, see HUSBAND AND WIFE, 6, 7.

Mandamus:

Review of judgment directing clerk to call school election, see CERTIORARI.

1. MANDAMUS (4)—TO COURTS—REMEDY BY APPEAL. The refusal of the trial court to permit suit against a receiver upon matters covered by a show cause order in the receivership proceedings does not entitle the petitioner to a writ of mandate to compel the court to assume jurisdiction, since the parties and the subject-matter are all before the court, and there is a remedy by appeal from any final judgment in the receivership proceedings. *State ex rel. Farmers State Bank v. Superior Court*..... 297

Marriage:

Denial of as affecting right to allowance for maintenance and suit money, see HUSBAND AND WIFE, 7.

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

Lien of miners for services, see MINES AND MINERALS.

1. MASTER AND SERVANT (17)—WORK AND LABOR (15)—ACTION FOR WAGES—CONTRACT—DURATION OF TERM—AMOUNT OF RECOVERY. Under a contract of employment for an indefinite period, to be compensated by a stated salary per month and in addition by a certain percentage of the profits, where the employee is compelled to abandon the employment by reason of sickness, he is entitled to a pro rata share of the profits of the business during the period he actually served. *Frye v. Blackwell & Co.*..... 107
2. MASTER AND SERVANT (20-1)—INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—"PLANT"—SCOPE OF EMPLOYMENT—ELECTION OF REMEDIES. An electric railway motorman who had registered for his daily service and then left the plant and premises in pursuit of his own pastime, prior to taking up the duties of his employment, and was injured in a street accident, does not come within the provisions of Rem. Code, § 6604-3, requiring him to elect in advance of suit whether to take under the workmen's compensation act or seek a remedy against the party liable for the injury. *Hoffman v. Hansen*..... 73
3. MASTER AND SERVANT (174, 182)—INJURY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. The owner of an automobile is not liable for injury to a person caused by the negligence of one driving the car when the latter is not using it at the time in the employment, or upon the business, of the owner, but on business or pleasure of his own without any reference to the business of the owner; and the presumption that he was using it in the business of the owner is rebutted, as a matter of law, where a friend of the owner volunteered to take the car back to the garage, but instead of doing so drove about for his own pleasure. *Savage v. Donovan* 692

Maturity:

Extension of time as defense to foreclosure, see MORTGAGES.

Measure of Damages:

In general, see DAMAGES.

For wrongful death, see DEATH, 1, 3.

For breach of charter party, see SHIPPING, 4.

Mechanics' Liens:

Liens on logs and lumber, see LOGS AND LOGGING.

Mining liens, see MINES AND MINERALS.

Mechanics' Liens—Continued.

1. **MECHANICS' LIENS (26)—CONSENT OF OWNER—LESSEE AS AGENT OF OWNER.** Conceding, without deciding, that the lessee of a mining claim is the statutory agent of the owner, the lessee would have no authority under the mechanics' lien law to procure one to furnish labor or material on the land of a stranger. *Olson v. Busy Bee Mining & Development Co.*..... 24
2. **SAME (24, 28)—CONSENT OF OWNER—CONTRACT WITH LESSEE—ESTOPPEL.** The owner of a mining claim is not estopped to deny the right of one employed by the lessee to drive a tunnel to assert a mechanics' lien on the property, though having knowledge the work was in progress, where the owner did not know at what angle or in what direction it would be constructed, nor that it would be driven on the land of another. *Olson v. Busy Bee Mining & Development Co.* 24

Memoranda:

Admissibility in evidence, see **EVIDENCE**, 5.

Merger:

Of offenses, see **CRIMINAL LAW**, 1.

Mines and Minerals:

Interests in as subject to execution, see **EXECUTION**.

Mining machinery as fixtures, see **FIXTURES**.

Right to lien for labor furnished without consent of owner, see **MECHANICS' LIENS**.

1. **MINES AND MINERALS (20)—MECHANICS' LIENS (24)—RIGHT TO LIEN—OWNERSHIP AND CONSENT BY OWNER—STATUTES.** One employed to construct a tunnel in a mining claim cannot enforce a lien for his labor as authorized by Rem. Code, §1129, where the tunnel is driven upon the property of another than his employer. *Olson v. Busy Bee Mining & Development Co.*..... 24

Misrepresentation:

See **FRAUD**.

Mistake:

Affecting validity of election of remedy, see **ELECTION OF REMEDIES**.

Recovery of payment made by mistake, see **PAYMENT**.

Money:

Recovery of payment made by mistake, see **PAYMENT**.

Money Paid:

Recovery of payments, see **PAYMENT**.

Money Received:

Recovery of price paid for goods, see SALES, 7.

Recovery of price paid for land, see VENDOR AND PURCHASER, 2.

Mortgages:

Costs and attorney's fees on foreclosure, see COSTS, 2.

1. MORTGAGES (132, 143)—FORECLOSURE—DEFENSES — EXTENSION OF MATURITY OF DEBT. In an action to foreclose a mortgage, the defense that its maturity had been extended for a period of three years is not established by evidence showing the mortgagee offered an extension for that period at an interest rate of seven per cent, and it appears that the mortgagor had notified his agent to get the money at six per cent or at any rate better than the mortgagee's proposition, and that, on the agent's taking the matter up with the mortgagee, the latter withdrew his offer of an extension. *Rumbaugh v. Jordan*..... 539

Motions:

For continuance in civil actions, see CONTINUANCE.

To strike out evidence, see TRIAL, 3.

Municipal Corporations:

Charitable bequest to city of other state, see CHARITIES, 1.

Exercise of power of eminent domain, see EMINENT DOMAIN.

Judicial notice of ordinance, see EVIDENCE, 1, 2.

Violation of ordinance prohibiting sale of property by chance, see LOTTERIES.

1. MUNICIPAL CORPORATIONS (22, 23)—PORT DISTRICTS—GOVERNMENTAL POWERS—ABANDONMENT OF SERVICE. The port of Seattle, being a public corporation created by law to exercise governmental purposes, may abandon the operation of a ferry which it finds unprofitable, since it is not subject to the limitations of a private corporation which holds a ferry franchise. *Woody v. Port of Seattle* 163
2. MUNICIPAL CORPORATIONS (22, 23, 26)—GOVERNMENTAL POWERS—PORT DISTRICTS—OPERATION OF FERRIES—DELEGATION OF AUTHORITY—DISCRETION OF OFFICERS. Where a ferry line which the port of Seattle had been authorized by popular vote to operate was transferred by it to the county, not as a sale of the property but as a delegation of authority to operate, a mandatory injunction will not lie against either the port or the county to compel the maintenance of the service as originally inaugurated, where an alteration in service does not substantially vary the original plan. *Raine v. Port of Seattle* 168
3. SAME (44)—ORDINANCES—VALIDITY—FRANCHISE. An ordinance providing for entering into a contract with the most satisfactory

Municipal Corporations—Continued.

- bidder for the disposal of garbage is not one granting a franchise, since no right or privilege is thereby granted. *State v. Lovelace* 50
4. SAME (45)—ORDINANCE—VALIDITY—SUBJECT AND TITLE. The title of an ordinance reciting that it is one for the letting of an exclusive contract for the disposal of garbage and rubbish and providing certain penalties, is broad enough to cover a section requiring any person disposing of his own garbage at any designated dump to first pay to the city clerk a fee of one dollar and a half for each load. *State v. Lovelace*..... 50
 5. SAME (45). The objection that the penalty of an ordinance is not covered by its title cannot be raised by one who is not charged with a violation of the ordinance. *State v. Lovelace*..... 50
 6. MUNICIPAL CORPORATIONS (53) — ORDINANCES — PLEADING. Rem. Code, § 291, respecting the manner of pleading a city ordinance applies only in cases originally commenced in courts other than those of the municipality whose ordinance is involved. *Olympia v. Nickert* 407
 7. SAME (99) — HEALTH REGULATIONS — ORDINANCE — VALIDITY — AWARD OF CONTRACT TO BIDDER. Where an ordinance authorizing the letting of a contract for the disposal of garbage to the highest bidder means to such person as the city council shall deem best qualified and equipped for the performance of the contract who would perform it for the lowest charge to the people served, and where there is no showing of its being productive of revenue, it cannot be held invalid. *State v. Lovelace*..... 50
 8. SAME (157, 158)—CONTRACTOR'S BOND—VALIDITY—COMMON LAW BOND. Where a bond taken to secure the faithful performance of a public contract does not comply with the statutory requirements that it have more than one surety and be for the full amount of the contract price, it is nevertheless valid as a common law bond. *Smith v. Tukwila* 266
 9. MUNICIPAL CORPORATIONS (165)—PUBLIC IMPROVEMENTS—CONTRACT—ABANDONMENT BY CONTRACTOR—EVIDENCE—SUFFICIENCY. Where contractors on public work abandon their contract, they thereby create an anticipatory breach which furnishes an excuse for non-performance on the part of the other party. *Smith v. Tukwila* 266
 10. SAME (166)—CONTRACT—PERFORMANCE—APPROVAL OR CERTIFICATE OF OFFICERS—NECESSITY. Where it is a prerequisite to the right of a public contractor to recover an installment payment due on a street improvement contract that he shall procure a certificate by the street committee stating the amount earned, a report by one member of the street committee to the town council of what is due the contractor will not excuse the nonproduction of the certificate. *Smith v. Tukwila* 266

Municipal Corporations—Continued.

11. **MUNICIPAL CORPORATIONS (258, 260) — IMPROVEMENTS — ASSESSMENTS—TIME FOR FILING OBJECTIONS—HEARINGS.** Under Rem. Code, § 7892-21, providing that property holders desiring to object to assessments for sewer construction by a municipality shall file their objections in writing with the clerk thereof prior to the date fixed for hearing by the council, such objections not filed prior to the date set for hearing are nevertheless timely made where the original hearing is adjourned to a later date, and the objections are filed prior to the adjourned hearing. *In re Grandview*..... 464
12. **SAME (260)—IMPROVEMENTS—ASSESSMENTS — OBJECTIONS.** Objections to an assessment for the construction of trunk and lateral sewers filed with a town council, though containing many things foreign to the inquiry on appeal before the superior court, were sufficient where they raised objections that the assessments were not levied according to special benefits, that they amounted to confiscation of property, and were unreasonable, oppressive, arbitrary and made upon a fundamentally wrong basis. *In re Grandview* 464
13. **SAME (267-1)—QUESTIONS NOT REVIEWABLE.** The action of a city council in excluding certain property from a proposed local improvement district will not be disturbed by the courts. *In re Grandview* 464
14. **SAME (267-3)—IMPROVEMENTS—ASSESSMENTS—ARBITRARY ACTION.** Under Rem. Code, §§ 7892-13, 7892-15, providing that assessments for trunk sewers under the zone system shall be distributed over all the property between the terminus of a trunk sewer to the middle of the block in an amount representing the reasonable cost of a local sewer, and the balance of the total cost shall be distributed over all the property within the entire district in accordance with special benefits and in proportion to area, an assessment was made arbitrarily and on a fundamentally wrong basis where two assessments were made against the same property on account of the sewer being laid on two sides, unplatted average was omitted, and agricultural property in the outskirts was assessed at the same rate as business property. *In re Grandview*..... 464
15. **SAME (267-3)—IMPROVEMENTS—ASSESSMENTS—BOUNDARIES OF DISTRICT—REVIEW.** Though a local improvement diffuses benefits generally throughout a municipality, such fact will not sustain an arbitrary assessment which has proceeded upon a wrong basis and in direct opposition to the essential requirements of its statutes. *In re Grandview* 464
16. **MUNICIPAL CORPORATIONS (319) — HEALTH REGULATIONS — ORDINANCE—POWERS OF CITY.** An ordinance of a city of the third class for the disposal of garbage is a valid exercise of municipal power under Const., art. 11, § 11, giving any city power to make such

Municipal Corporations—Continued.

- local sanitary regulations as are not in conflict with general laws, and Rem. Code, § 7671-14, subd. (r) especially authorizing cities of the third class to enact and enforce local, police, sanitary and other regulations. *State v. Lovelace*..... 50
17. MUNICIPAL CORPORATIONS (329) — POWERS — PENAL ORDINANCES — VALIDITY—CONFLICT WITH STATE LAW. A city ordinance with reference to lotteries is enforceable, though it may be broader and more inclusive than state statutes upon the same general subjects. *Society Theatre v. Seattle*..... 258
18. MUNICIPAL CORPORATIONS (379)—STREETS—NEGLIGENT USE—COLLISION AT CROSSING—LAW OF ROAD—VIOLATION OF ORDINANCE. Where a collision occurs between an automobile and a bicycle, both of which were proceeding on the wrong side of the street, the bicycle rider is not chargeable with contributory negligence, if he had been forced into that position in an effort to avoid the negligence of the driver of the automobile. *Wilbert v. Sturgeon*..... 551
19. MUNICIPAL CORPORATIONS (380, 391)—STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—RIGHT OF WAY. An ordinance giving vehicles the right of way over pedestrians between street intersections and crossings does not confer the absolute right of way upon the vehicle, but imposes upon the pedestrian a higher degree of care than at regular crossings. *Hoffman v. Hansen* 73
20. MUNICIPAL CORPORATIONS (383, 391)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a pedestrian, acting under emergency in seeking to avoid being run over by an automobile, acts as an ordinarily prudent man would under the circumstances, is a question of fact for the jury. *Carlson v. Herbert* 82
21. MUNICIPAL CORPORATIONS (388)—USE OF STREETS — ACTIONS — ADMISSIBILITY OF EVIDENCE. Where an automobile operator was charged by a complaint in an action for personal injuries with negligently driving his car at a dangerous and unlawful rate of speed, it was not error to admit testimony by a witness qualified as an expert on speed and on stopping cars under varying conditions, that defendant's car could have been stopped within thirty feet if there had been chains on his wheels. *Carlson v. Herbert* 82
22. SAME (390)—USE OF STREETS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Whether plaintiff could have been injured by an automobile as he claimed, in view of testimony as to the part of the automobile with which he came in contact, was a matter for the jury, and not ground for a motion for judgment notwithstanding the verdict. *Hoffman v. Hansen*..... 73
23. SAME (390). Where the evidence in an action for personal injuries showed that an automobile without lights, while it was still

Municipal Corporations—Continued.

dark, was driven at an excessive rate of speed, swerved from near the middle of the street to a point at or near the curb and ran down plaintiff while he was endeavoring to get from the street to the curb, it presented a question for the jury, and was not subject to motion challenging the sufficiency of the evidence nor to motion for judgment notwithstanding the verdict. *Hoffman v. Hansen* 73

24. MUNICIPAL CORPORATIONS (392)—USE OF STREETS—NEGLIGENCE—INSTRUCTIONS. Where a traffic ordinance had been introduced in evidence, though not pleaded in the complaint, it was not error for the court to charge the jury that automobiles are required to keep as near the right-hand curb, in the direction in which they are going, as is practicable, when it clearly appeared that the situation at the scene of the accident made the instruction proper. *Hoffman v. Hansen* 73

25. SAME (392)—USE OF STREETS—ACTIONS—INSTRUCTIONS. In an action for personal injuries suffered as the result of a pedestrian being struck on a city street by an automobile, the court properly charged the jury that "no person driving or operating a motor vehicle should drive or operate the same in any other than a careful and prudent manner, nor at a greater speed than is reasonable and proper, having due regard to the traffic or use of the way by others, or so as to endanger the life and limb of any person." *Carlson v. Herbert*..... 82

26. SAME (392)—USE OF STREETS—INSTRUCTIONS. In actions by a mother and a minor child for personal injuries inflicted by defendant, a requested instruction that if the child was in the custody of the mother at the time, and that the accident and resulting injury to the child was the result of the mother's negligence the child could not recover, if conceded to be the law, was properly refused where the evidence showed the negligence of defendant, without contributory negligence on the part of either plaintiff. *Carlson v. Herbert*..... 82

27. MUNICIPAL CORPORATIONS (566)—CLAIMS—STATUTORY RESIDENCE OF CLAIMANT—CORPORATIONS. Rem. Code, § 7995, requiring a claimant for damages against a city to include in the claim "a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued" is inapplicable to corporations, inasmuch as they have no actual residence within the term as used in the statute. *Western Wall Board Co. v. Seattle* 340

Murder:

See HOMICIDE.

Mutuality:

Necessity for mutuality of obligation, see **CONTRACTS**, 1.

Navigable Waters:

Bodies and streams of water not capable of navigation, see **WATERS AND WATER COURSES**.

Necessity:

For condemnation for public use, see **EMINENT DOMAIN**, 1.

Negligence:

Of carrier causing loss of or injury to goods, see **CARRIERS**, 10, 11.

Causing death, see **DEATH**.

In use of highway, see **HIGHWAYS**.

Of employers, see **MASTER AND SERVANT**, 2, 3.

Act of servant constituting negligence as against third persons, see **MASTER AND SERVANT**, 3.

Causing injuries to persons on city streets, see **MUNICIPAL CORPORATIONS**, 18-26.

Accidents at railroad crossings, see **RAILROADS**.

Of bailee of fishing net, see **SHIPPING**, 2.

In operation of street railroads, see **STREET RAILROADS**.

Negotiable Instruments:

See **BILLS AND NOTES**.

Newly Discovered Evidence:

Ground for new trial, see **CRIMINAL LAW**, 11; **NEW TRIAL**, 2-4.

New Trial:

In criminal prosecutions, see **CRIMINAL LAW**, 10, 11.

1. **NEW TRIAL (22)—GROUNDS—SUFFICIENCY OF EVIDENCE.** In an action for personal injuries, defendant is not entitled to a new trial on the ground plaintiff swore falsely as to having a child, when in fact the child had been adopted by his mother, there being no examination as to the support of the child, and the matter of the child was only incidentally brought out in cross-examination. *Hoffman v. Hansen*..... 73
2. **NEW TRIAL (34)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DISCRETION.** The denial of a motion for a new trial cannot be said to be an abuse of the court's discretion in such matters where the affidavits for and against are flatly contradictory, and when one of the affidavits for a new trial was that of a person who was admittedly a wrongdoer in the subject-matter of the action. *Hafner v. Fitzpatrick* 80
3. **NEW TRIAL (39)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CREDIBILITY.** A new trial will not be granted for newly discovered evi-

New Trial—Continued.

dence which goes merely to the credibility of the opposite party as a witness. *Hoffman v. Hansen*..... 73

4. SAME (39)—NEWLY DISCOVERED EVIDENCE—CREDIBILITY OF WITNESS. An affidavit of newly discovered evidence supporting a motion for new trial on that ground is insufficient where it discloses matter going only to the credibility of plaintiff as a witness, rather than to her right of recovery. *Johnson v. Smith*..... 146
5. NEW TRIAL (49-1)—MISCONDUCT OF JURY. The affidavit of a third person, based upon the unsworn statement of a juror to him after the trial, respecting misconduct of a juror in the jury room, is not sufficient to support a motion for a new trial. *Johnson v. Smith* 146

Notes:

Promissory notes, see **BILLS AND NOTES**.

Notice:

Of proposal for bids for highway improvement, see **COUNTIES**.
 Of authority of officer to person dealing with corporation, see **CORPORATIONS**, 8.
 Establishment of drains, see **DRAINS**, 2.
 Of school election, see **ELECTIONS**, 1.
 Proof of service, see **EMINENT DOMAIN**, 3.
 Judicial notice, see **EVIDENCE**, 1, 2.
 Time to present claims, see **EXECUTORS AND ADMINISTRATORS**, 3.
 Default fixing liability of surety, see **PRINCIPAL AND SURETY**, 5.

Objections:

Review as dependent on objection made on trial, see **APPEAL AND ERROR**, 2-4.
 To local assessment, see **MUNICIPAL CORPORATIONS**, 11, 12.
 To evidence, sufficiency, see **TRIAL**, 3.

Officers:

Corporate officers, see **CORPORATIONS**, 5-8.
 Canvass and custody of election returns, see **ELECTIONS**, 4-6.
 Quo warranto to try title, see **QUO WARRANTO**.
 School officers, powers of, see **SCHOOLS AND SCHOOL DISTRICTS**.

1. OFFICERS (18) — EXTENT OF TERM — STATUTES — CONSTRUCTION. Rem. 1915 Code, § 4910-10, and Laws 1919, p. 475, § 23, providing for the appointment of voting machine custodians temporarily for election purposes, and for the appointment of a "permanent" employee as custodian in case any county or city shall own two hundred or more machines, does not contemplate the appointment of a custodian to hold for life or during good behavior, such term

Officers—Continued.

being used solely to distinguish between the two classes of custodians, and hence such "permanent" custodian is removable at the pleasure of the appointing power. *Irving v. Ferguson*..... 37

Opinion Evidence:

In criminal prosecution, see CRIMINAL LAW, 5.

Option:

Sale as distinguished from option, see VENDOR AND PURCHASER, 1.

Oral Contracts:

See FRAUDS, STATUTE OF.

Specific performance, see SPECIFIC PERFORMANCE, 1, 3.

Oral Evidence:

See EVIDENCE, 6-9.

Orders:

Review of appealable orders, see APPEAL AND ERROR, 1.

For consolidation of drainage districts, see DRAINS, 3.

Ordinances:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 3-7, 16, 17.

Violation of by driver of vehicle, see MUNICIPAL CORPORATIONS, 18, 19.

Ownership:

Of property attached, see ATTACHMENT.

Of stolen property, see LARCENY, 1.

Parent and Child:

Actions for wrongful death of child, see DEATH, 1, 2.

Determination as to custody of child, see HABEAS CORPUS.

Trust transactions between, see TRUSTS, 1.

1. PARENT AND CHILD (2)—AGREEMENTS AS TO CUSTODY OR CONTROL—CONTRACTS—PUBLIC POLICY. An agreement by a father giving the care and custody of an infant child to its grandparents during their life, which has not been made the basis of a legal adoption by the grandparents is void as against public policy. *In re Smith*..... 1

Parol Agreements:

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF.

Parol Evidence:

See EVIDENCE, 6-9.

Parties:

Joinder of actions against different parties, see ACTION, 1.

Entitled to allege error, see APPEAL AND ERROR, 8-10.

Parties—Continued.

- Capacity of corporation to sue, see CORPORATIONS, 9.
- Rights and liabilities as to costs, see COSTS.
- In condemnation proceedings, see EMINENT DOMAIN, 2.
- Admissions as evidence, see EVIDENCE, 3.
- Parol evidence as to parties, see EVIDENCE, 8.
- Entitled to purchase property of estate, see EXECUTORS AND ADMINISTRATORS, 5.
- Interpleading, see INTERPLEADER.
- Entitled to question validity of ordinance, see MUNICIPAL CORPORATIONS, 5.
- Entitled to redeem from sale for delinquent irrigation tax, see WATERS AND WATER COURSES, 6.

1. PARTIES (2)—PLAINTIFFS—REAL PARTY IN INTEREST. Where one contracting with a broker for the purchase of real estate gives a check payable to the broker as earnest money to bind the bargain, and a receipt is issued to the purchaser reciting that, in case of failure to complete the contract, the earnest money shall be forfeited to the broker to the extent of his agreed commission, the broker is entitled to bring suit on the check, as the real party in interest within Rem. Code, § 179. *West & Wheeler v. Longtin*.. 575

Part Performance:

- Of oral contract for land, see SPECIFIC PERFORMANCE, 1.

Payment:

- Recovery of price paid for goods, see SALES, 7.
- Of taxes, see TAXATION, 2.
- Tender of payment, see TENDER.
- Price of land sold, see VENDOR AND PURCHASER, 2.

1. PAYMENT — MISTAKE — RECOVERY OF PAYMENT — CONSIDERATION. Where a carrier by water collected freight on a shipment of furniture on the customary basis of space rates, instead of at the rate for general merchandise which the shipper claims he contracted for, the alleged overcharge cannot be recovered on the theory of money paid by mistake, since the money was paid upon a consideration and the charge was reasonable for the service rendered; and if it be considered a mistake in the terms of the contract, it was a mistake of law for which there could be no recovery. *Lincoln v. Kuskokwim Fishing & Transportation Co.*..... 137

Penalties:

- Under contracts, see DAMAGES, 1, 2.
- Penal ordinances, see MUNICIPAL CORPORATIONS, 17.
- For nonpayment of tax, see TAXATION, 1.

Performance:

- Of contract of employment, see **BROKERS**.
- Certificate of approval of public work, see **MUNICIPAL CORPORATIONS**, 10.
- Of contract of sale, see **SALES**, 2-6.
- Of contract by plaintiff, see **SPECIFIC PERFORMANCE**, 3.

Personal Injuries:

- Survival of right of action of person injured, see **DEATH**, 1.
- To employee or third person, see **MASTER AND SERVANT**, 2, 3.
- Collision with automobile, see **MUNICIPAL CORPORATIONS**, 18-26.
- To traveler on highway crossing railroad, see **RAILROADS**.
- To persons on or near street railroad tracks, see **STREET RAILROADS**.

Personal Property:

- As subject to attachment, see **ATTACHMENT**.
- Subject to execution, see **EXECUTION**.
- Sales in bulk, see **FRAUDULENT CONVEYANCES**.

Physical Examination:

- Compelling party to submit to, see **DISCOVERY**.

Physicians and Surgeons:

- Opinion evidence, see **CRIMINAL LAW**, 5.

Plaintiffs:

- Real party in interest, see **PARTIES**.

Pleading:

- Joinder of causes of action, see **ACTION**, 1.
 - Appealability of order on demurrer, see **APPEAL AND ERROR**, 1.
 - Amount of recovery as dependent on complaint, see **APPEAL AND ERROR**, 3.
 - Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 19-24.
 - Filing new complaint charging higher offense, see **CRIMINAL LAW**, 2.
 - In actions for fraud, see **FRAUD**, 2.
 - Complaint in prosecution for unlawful possession of liquor, see **INTOXICATING LIQUORS**, 5.
 - City ordinance, see **MUNICIPAL CORPORATIONS**, 6.
1. **PLEADING (53)—GENERAL DENIAL—SCOPE.** In an action by a landlord against a tenant for damages at the close of the term, based on the tenant's failure to leave the same quantity of land in summer fallow as existed at the time of entry, the complaint alleging ownership in plaintiffs of such summer fallow, is sufficiently traversed by a general denial as to permit the introduction of

Pleading—Continued.

- evidence showing that neither by the understanding of the parties nor by custom was it incumbent on defendant to leave the same amount of summer fallow on vacating the land. *Chase v. Smith* 410
2. PLEADING (56)—ANSWER—ADMISSIONS. Where an ordinance not in existence at the time of an accident is pleaded as a fact, an answer admitting the passage of such ordinance as of a date subsequent to the accident, does not preclude the right to raise the objection that it was non-existent when the accident occurred. *Rowell v. Eldridge Buick Co.*..... 697
3. PLEADING (101, 112)—TRIAL AMENDMENTS—DISCRETION — NEW CAUSES OF ACTION. The refusal to allow a trial amendment to defendant's answer so as to set up an additional element of contributory negligence was not an abuse of the court's discretion, where the matter was not newly discovered, would have introduced a new issue, and would have necessitated a continuance of the cause or a submission of the case on the defendant's evidence alone. *Finn v. Bremerton* 381
4. PLEADING (181)—VARIANCE—MATERIALITY TO ISSUE. A complaint alleging that a collision between vehicles occurred "about three feet from the curb, at the northwest corner" of two streets, while the proof showed the accident was some twenty feet north of that point, does not constitute a fatal variance, when there is no showing the defendant was misled by the pleading. *Wilbert v. Sturgeon* 551
5. SAME (196)—WAIVER OF DEMURRER—PLEADING OVER. Error in sustaining a demurrer to a complaint is waived where the plaintiff files an amended complaint. *Chase v. Smith*..... 410

Pledges:

Of property by executor, see EXECUTORS AND ADMINISTRATORS, 1, 2.

1. PLEDGES (3)—WHAT CONSTITUTES — DELIVERY AND POSSESSION. Where the holder of corporate stock sells it to another, who pays part of the price and delivers promissory notes for the balance, the certificate of stock being left in the possession of the seller without any express agreement as to the purpose other than that he retain possession until the notes are paid, the transaction constitutes a pledge of such stock to secure the indebtedness of the purchaser, instead of a conditional sales contract. *Kuhn v. Groll*..... 285

Policy:

Of insurance, see INSURANCE.

Port Districts:

Operation of ferries, see MUNICIPAL CORPORATIONS, 1, 2.

Possession:

- Illegal possession of liquor, see INTOXICATING LIQUORS.
- Of demised premises, see LANDLORD AND TENANT, 3, 4.
- Of property by accused, see LARCENY, 4.
- By seller of corporate stock to secure debt of purchaser, see PLEDGES.
- As part performance of contract, see SPECIFIC PERFORMANCE, 1.

Powers:

- Of public service commission, see CARRIERS, 1; TELEGRAPHS AND TELEPHONES.
- Of court to change venue of action brought against corporation in wrong county, see CORPORATIONS, 10.
- Of county board to order drainage improvement, see DRAINS, 1.
- Of election officers, see ELECTIONS, 6.
- Of executor in management of property, see EXECUTORS AND ADMINISTRATORS, 1.
- Of port district, see MUNICIPAL CORPORATIONS, 1, 2.
- Of school district board, see SCHOOLS AND SCHOOL DISTRICTS.

Practice:

- See APPEAL AND ERROR; CERTIORARI; MANDAMUS; NEW TRIAL; PLEADING.
- Grounds for continuance of actions, see CONTINUANCE.

Prejudice:

- Ground for reversal in civil actions, see APPEAL AND ERROR, 19-24.

Presentment:

- Of claims against receiver, see CORPORATIONS, 12, 13.
- Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3.
- Of claim against municipality, see MUNICIPAL CORPORATIONS, 27.

Presumptions:

- On appeal, see APPEAL AND ERROR, 11.
- As to community nature of property, see HUSBAND AND WIFE, 2.
- From possession of liquor, see INTOXICATING LIQUORS, 7.

Principal and Agent:

- See BROKERS.
- Cancellation of deed for fraud of agent, see CANCELLATION OF INSTRUMENTS.
- Authority of agent on indorsement of bill of lading, see CARRIERS, 6.
- Corporate agents, see CORPORATIONS, 5, 6, 8.
- Master's liability for wrongful acts or commissions of servant, see MASTER AND SERVANT, 3.
- Authority of agent to make improvement as affecting right to mechanics' lien, see MECHANICS' LIENS, 1.

Principal and Agent—Continued.

1. **PRINCIPAL AND AGENT (9, 36½, 42)—RELATION—AUTHORITY OF AGENT—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—EVIDENCE—SUFFICIENCY.** One not bound on the face of a written obligation cannot be chargeable with liability thereon in the absence of a showing that it was executed for and on his behalf by some person authorized by him to so execute it. *Growers & Producers Co. v. Fischer*... 16
2. **PRINCIPAL AND AGENT (18)—CONVERSION BY AGENT—LIABILITY TO PRINCIPAL—EFFECT OF CONDITIONAL BILL OF SALE.** Where an automobile is placed in the hands of an agent to sell for cash, and the agent sells to a third person on terms by which he secures the full amount in cash, though the transaction embraces a conditional sale contract which is made out in the name of a finance company engaged in advancing money to the agent on such sales, the owner has no recourse against the finance company, his remedy being against his agent. *Stevenson v. MacCallum-Donahoe Finance Co.*..... 683
3. **PRINCIPAL AND AGENT (52, 63)—UNDISCLOSED AGENCY—LIABILITY TO THIRD PERSONS—RATIFICATION OF ACTS OF AGENT—CONTRACTS OF SALE.** Where a fruit grower's company makes a contract for the sale of the fruit raised by its individual stockholders, a stockholder, by taking advantage of the terms of the contract to dispose of his early and soft fruits to the buyer at a price higher than the market value, thereby ratifies and adopts the contract of the company calling for the delivery to the buyer of his crop of winter apples, and is liable in damages for a breach on his part. *Barnett Bros. v. Lynn* 315
4. **PRINCIPAL AND AGENT (52-1)—UNDISCLOSED AGENCY—LIABILITY OF AGENT.** Where, at the time of entering into a contract, it is fully known by the parties thereto that it is made for the benefit of other parties, no question of undisclosed principal is involved, and the contract is enforceable only against the party named, without any right of recourse against the third parties who are beneficially interested. *Barnett Bros. v. Lynn*..... 308

Principal and Surety:

Liabilities of sureties on contractor's bond, see MUNICIPAL CORPORATIONS, 8.

1. **PRINCIPAL AND SURETY (3)—EXECUTION OF BOND—BY COSURETY.** A surety on a contractor's bond on public work who signs on the understanding that another surety is to be procured, cannot escape liability where the bond is accepted by the obligee with no notice of such condition. *Smith v. Tukwila*..... 266
2. **PRINCIPAL AND SURETY (8)—LIABILITY—FRAUD OF OBLIGEE—EVIDENCE—SUFFICIENCY.** The obligee under a building contractor's bond is not chargeable with fraud in failing to notify the bonding com-

Principal and Surety—Continued.

- pany that the contractor was in default on his contract and had already been paid a considerable sum thereon, it being the bonding company's privilege to inquire, and not the obligee's duty to volunteer the information. *Molin v. Anderson*..... 208
3. SAME (8)—LIABILITY—FRAUD OF OBLIGEE—KNOWLEDGE OF FACTS AS CONSTITUTING FRAUD. Where a contractor's bond was given to protect the owner under a contract calling for the erection of four dwelling houses, the fact that the building contract recited that all the houses were on one street, while in fact one of them was on another street in the same block, would not constitute a defense against the bond where the bonding company by investigation could readily have learned the fact, it further appearing that the surety was not misled to its injury, since the total cost was not increased. *Molin v. Anderson*..... 208
4. SAME (19)—EXTENT OF LIABILITY—PERFORMANCE—BUILDING CONTRACTS. The fact that a contractor's bond was written after the work on the houses covered thereby had been commenced would not affect liability under the bond, where it was conditioned that the contractor should perform the whole contract and not a part of it. *Molin v. Anderson*..... 208
5. SAME (40)—DISCHARGE OF SURETY—FAILURE TO GIVE NOTICE. Notice to a surety on a building contractor's bond of his abandonment of the contract, given by the obligee twenty-three days after learning thereof, is within a reasonable time, under a provision of the bond calling for formal notice immediately after knowledge of the default of the contractor, where the surety already had knowledge of the default and there is no showing of injury or damage because formal notice was not sooner given. *Molin v. Anderson*..... 208

Priorities:

- Of claims against insolvent corporations, see CORPORATIONS, 13.
 In condemnation proceedings, see EMINENT DOMAIN, 1.
 Of laborer's lien, see LOGS AND LOGGING, 1.

Private Roads:

- Rights of way, see EASEMENTS.

Privileged Communications:

- Disclosure by witness, see WITNESSES, 1.

Process:

- Service on agent of foreign corporations, see CORPORATIONS, 14.

Profits:

- Loss of profits as element of damages, see DAMAGES, 4, 5, 7-9.
 Right of heir to recover mesne profits of estate, see DESCENT AND DISTRIBUTION.

Prohibition:

See INTOXICATING LIQUORS, 1, 2.

1. PROHIBITION (20)—GROUNDS—WANT OF JURISDICTION. Prohibition will lie to prevent a court from further proceeding in an action against a corporation which is brought in the wrong county. *State ex rel. Grays Harbor Commercial Co. v. Superior Court*..... 674

Promise:

To pay debt of another, see FRAUDS, STATUTE OF, 1.

Promissory Notes:

See BILLS AND NOTES.

Property:

Effect of assignment of rights in property, see ASSIGNMENTS, 2.
 Subject to attachment, see ATTACHMENT.
 Award of on divorce, see DIVORCE, 4, 5.
 Taking for public use, see EMINENT DOMAIN.
 Subject to execution, see EXECUTION.
 Annexation of personal to real property, see FIXTURES. .
 Separate or community character of, see HUSBAND AND WIFE, 2-5.
 Subject to labor liens, see LOGS AND LOGGING.

Proposal:

Notice of call for bids for highway improvement, see COUNTIES.

Province of Court and Jury:

In criminal prosecutions, see CRIMINAL LAW, 6.
 Instructions invading province of jury, see TRIAL, 4.

Publication:

Of notice of call for bids for highway improvement, see COUNTIES.

Public Debt:

See SCHOOLS AND SCHOOL DISTRICTS, 2.

Public Improvements:

By counties, see COUNTIES.
 By cities, see MUNICIPAL CORPORATIONS, 8-15.

Public Lands:

Interests in, as subject to execution, see EXECUTION.
 Collateral attack on judgment or order of sale, see JUDGMENT, 1.

1. PUBLIC LANDS (72)—EXEMPTIONS—LIABILITY FOR DEBTS—RENEWAL NOTES. Under U. S. Rev. Stat. § 2296, exempting public lands from liability to the satisfaction of any debt contracted prior to patent, a renewal note given after patent to replace notes given

Public Lands—Continued.

by the entryman prior to patent, cannot be enforced against the land, as against either the entryman or his grantee. *Rossano v. Burcham* 142

Public Policy:

Contracts as against public policy, see **INSURANCE**, 2.

Contract as to control or custody of child as against public policy, see **PARENT AND CHILD**.

Public Schools:

See **SCHOOLS AND SCHOOL DISTRICTS**.

Public Service:

Contracts for public or private service, see **ELECTRICITY**.

Public Service Commission:

Regulation of freight rates, see **CARRIERS**, 1-5.

Regulation of telephone companies, see **TELEGRAPHS AND TELEPHONES**.

Public Use:

Taking property for public use, see **EMINENT DOMAIN**.

Punishment:

For crime, see **CRIMINAL LAW**, 12-14.

For second violation of liquor laws, see **INTOXICATING LIQUORS**, 3.

Qualifications:

For admission to practice law, see **ATTORNEY AND CLIENT**, 1-3.

Of voters of irrigation district, see **WATERS AND WATER COURSES**, 5.

Quantity:

Of goods delivered, see **SALES**, 3-5.

Question for Jury:

In action for value of legal services, see **ATTORNEY AND CLIENT**, 4.

In criminal prosecutions, see **CRIMINAL LAW**, 6.

In action for injury from automobile in city street, see **MUNICIPAL CORPORATIONS**, 20, 22, 23.

In action for injuries at crossing, see **RAILROADS**, 1-5.

Quieting Title:

Property acquired at judicial sale, collateral attack on judgment, see **JUDGMENT**, 1.

Quo Warranto:

1. **QUO WARRANTO (5)—NATURE AND GROUNDS—ELECTION CONTEST—IRRIGATION DISTRICT OFFICERS.** Proceedings in quo warranto will lie to oust a director of an irrigation district whose election was

Quo Warranto—Continued.

secured by the votes of persons not entitled to vote. *State ex rel. Holt v. Hamilton*..... 91

Railroads:

Control and regulation of carriers, see CARRIERS, 1-5.

Carriage of goods and passengers, see CARRIERS, 6-11.

Railroads in city streets, see STREET RAILROADS.

1. RAILROADS (61, 71)—ACCIDENT AT CROSSING—NEGLIGENCE—FAILURE TO SIGNAL—EVIDENCE—SUFFICIENCY. In an action for the death of one driving an automobile across the track of an electric railway, the negligence of the defendant was a question for the jury where the evidence showed the train approached the crossing at a speed of fifty-five miles an hour; that it sounded no whistle; that the automatic electric signal failed to ring or show a red light; that no watchman was kept at the crossing; and that the view in the direction of the approaching train was obscured by a shelter house of defendant and a large pole and sign. *Swanson v. Puget Sound Electric R.* 4
2. RAILROADS (64)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE. Where it is customary at a railroad crossing over a city street to signal the movement of trains about to cross, an automobile driver who continues his course along the street in reliance upon the customary signal being given, and in the absence of any apparent danger, would not be chargeable with contributory negligence as a matter of law in case of a collision between his automobile and the train. *Ray v. Hines*..... 530
3. RAILROADS (64)—ACCIDENTS AT CROSSINGS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of plaintiff's contributory negligence in attempting to drive an automobile over a railroad crossing on a city street at a time when a train was approaching is one for the jury and not for the court, where plaintiff relied upon the crossing flagman for warning, which was not given in sufficient time, and in addition had taken some precautions for his safety, and had not heedlessly driven upon the track. *Patterson v. Oregon-Washington R. & Navigation Co.*.... 536
4. SAME (64, 71)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of one killed by an interurban railway train at a village crossing was for the jury where the evidence showed that the deceased brought his automobile to a standstill within five to eight feet of the track, then started up and was struck while crossing the track by the train running at a speed of fifty-five miles per hour; that the headlight of the train could have been seen for a distance of from 2,000 to 3,000 feet; that in the absence of any crossing signal the deceased might have assumed the headlight as that on the train of another railway; and that from

Railroads—Continued.

his position a view of the approaching train was obscured by intervening obstructions. *Swanson v. Puget Sound Electric R....* 4

5. RAILROADS (66)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. While it is a general rule that the contributory negligence of one riding as a guest in an automobile is a question for the jury in case of personal injuries resulting from a collision, yet where the evidence conclusively shows the guest guilty of such negligence, he or his personal representative should be nonsuited. *Sadler v. Northern Pac. R. Co.....* 121
6. SAME (66). Where an automobile truck was approaching a railroad crossing at a speed of three miles an hour, and a passenger riding as a guest on the side from which a railroad train was approaching could have had an unobstructed view of the train for the distance of a thousand feet and could have warned the driver to stop in good time or could have left the truck, he was guilty of such contributory negligence as to preclude recovery by his personal representative for his death. *Sadler v. Northern Pac. R. Co.* 121
7. SAME (66). One operating a train has a right to assume that a person approaching the track in an automobile will use reasonable care for his own protection, and will also give the train the right of way to which it is entitled under the law; and the operator of the train is not required to limit the speed or stop until it is apparent that those in the automobile about to cross the track are not aware of the approach of the train, or do not intend to give it the right of way. *Sadler v. Northern Pac. R. Co.....* 121
8. SAME (66). The duty imposed upon railway companies of giving signals on approaching highway crossings and of limiting their speed within city limits does not relieve the driver of a machine or his guest of the duty to use reasonable care; and where a guest of the driver could have seen or heard the approach of a train in time to save himself, his personal representative cannot recover for his death, even if the train failed to signal its approach or was exceeding the speed limit by city ordinance. *Sadler v. Northern Pac. R. Co.....* 121

Rates:

For carriage of freight, see CARRIERS, 1-5.

Charges for fire protection, see WATERS AND WATER COURSES, 4.

Ratification:

Of act of corporate officer or agent, see CORPORATIONS, 5.

Of act of agent, see PRINCIPAL AND AGENT, 3.

Real Estate Agents:

See BROKERS.

Real Property:

- Sale of real estate of decedent, see EXECUTORS AND ADMINISTRATORS, 5, 6.
- Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 2, 3.
- Oral gift of land, see GIFTS.
- Contracts for conveyance, see VENDOR AND PURCHASER.

Rebates:

- On payment of taxes, see TAXATION, 2.

Rebuttal:

- Evidence, see TRIAL, 2.

Receipts:

- Shipping receipts and bills of lading, see CARRIERS, 6-9.

Receivers:

- Of corporations in general, see CORPORATIONS, 12, 13.
- Mandamus to compel assumption of jurisdiction in receivership proceedings, see MANDAMUS.

Recitals:

- Conclusiveness of recitals in judgment, see JUDGMENT, 2.

Records:

- Transcript on appeal or writ of error, see APPEAL AND ERROR, 5-7.
- Parol evidence to vary writings, see EVIDENCE, 6.
- As proof of prior conviction of offense, see INTOXICATING LIQUORS, 3.

Redemption:

- From sale for delinquent irrigation tax, see WATERS AND WATER COURSES, 6.

Reformation of Instruments:

- Of contract for sale of goods, see SALES, 7.

Regulation:

- Of rates by carrier, see CARRIERS, 1-5.

Rehearing:

- See NEW TRIAL.

Release:

- Liability as surety, see PRINCIPAL AND SURETY, 5.

Representation:

- Representation of corporations by officers or agents, see CORPORATIONS, 5-8.

Reputation:

Of accused as evidence, see **CRIMINAL LAW**, 7.

Requests:

For instructions in criminal prosecutions, see **CRIMINAL LAW**, 7.

For instructions in civil actions, see **TRIAL**, 6-8.

Rescission:

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.

Res Gestae:

In criminal prosecutions, see **CRIMINAL LAW**, 3.

Residence:

Statement of claimant's residence in claim against city, see **MUNICIPAL CORPORATIONS**, 27.

Res Judicata:

See **JUDGMENT**, 3.

Bar by election of one of two inconsistent remedies, see **ELECTION OF REMEDIES**.

Resolutions:

For consolidation of drainage districts, see **DRAINS**, 3.

Resulting Trusts:

See **TRUSTS**, 2.

Return:

Of deposition, see **DEPOSITIONS**.

Returns:

Of election, see **ELECTIONS**, 4-6.

Revenue:

See **TAXATION**.

Review:

See **HABEAS CORPUS**.

In civil actions, see **APPEAL AND ERROR**.

Scope and extent, see **CERTIORARI**.

Right of Way:

Easements, see **EASEMENTS**.

In city streets, see **MUNICIPAL CORPORATIONS**, 19.

Roads:

Streets in cities, see **MUNICIPAL CORPORATIONS**, 18-26.

Salary:

Recovery by employee, see **MASTER AND SERVANT**, 1.

Sales:

Assignment of invoice to bank for borrowed money, see **ASSIGNMENTS**, 2.

Construction of contract, see **CONTRACTS**, 3.

On sale of corporate stock, see **CORPORATIONS**, 2, 3.

Mistaken remedy as bar to action for damages for fraud, see **ELECTION OF REMEDIES**.

Parol evidence to vary contract of sale, see **EVIDENCE**, 7-9.

By executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 5, 6.

Fraud inducing sale of property, see **FRAUD**.

Sale of stock in bulk as fraudulent as to creditors, see **FRAUDULENT CONVEYANCES**.

Effect of sale on insurance, see **INSURANCE**.

Of intoxicating liquors, see **INTOXICATING LIQUORS**, 4.

By agent, see **PRINCIPAL AND AGENT**, 2, 3.

Of real property, see **VENDOR AND PURCHASER**.

Of lands for delinquent irrigation tax, see **WATERS AND WATER COURSES**, 6, 7.

1. **SALES (3)—DISTINGUISHED FROM CONTRACT FOR MANUFACTURE.** A written contract calling for the sale and delivery of a certain number of apple boxes "now manufactured" and an additional number "to be manufactured" is a contract of manufacture and sale. *Leavenworth State Bank v. Cashmere Apple Co.*..... 356
2. **SAME (37, 77)—CONSTRUCTION OF CONTRACT—CONDITIONS—EXCUSES FOR FAILURE TO DELIVER—LOSS OF PLANT BY FIRE.** Where there was a shortage in the number of manufactured apple boxes at the seller's mill which a written contract of sale required to be delivered to the buyer, a subsequent oral agreement between the parties that the difference should be made up by manufacture at the seller's mill constituted an independent contract, and the seller could not take advantage of a clause in the written contract excusing performance in case of fire. *Leavenworth State Bank v. Cashmere Apple Co.* 356
3. **SALES (72)—PERFORMANCE OF CONTRACT—QUANTITY DELIVERED—EFFECT OF DEFICIENCY.** Under a contract for the sale of 75,000 boxes "now manufactured and in stock" at the seller's mill, the seller would be liable for any shortage in the number, although the pile of boxes had been inspected by the buyer, where the latter did not rely upon such examination but was assured by the mill company that the pile contained sufficient to supply the order, it being incumbent on the seller and not the buyer to know whether there was sufficient in stock. *Leavenworth State Bank v. Cashmere Apple Co.* 356

Sales—Continued.

4. SALES (72)—PERFORMANCE OF CONTRACT—QUANTITY—EXCESS DELIVERY. Where a fruit company, after contracting in writing with a mill company for a quantity of pear boxes, orally arranges that a portion of the boxes should be shipped to another fruit company, the former company would not be liable for any excess of boxes over the contract quantity delivered without its knowledge to the latter company. *Leavenworth State Bank v. Wenatchee Valley Fruit Exchange* 366
5. SALES (72)—PERFORMANCE OF CONTRACT—QUANTITY—EFFECT OF EXCESS DELIVERY. Where, under a written contract between a mill company and a fruit company, 15,000 pear boxes were to be delivered at a stated price, and by subsequent oral agreement a car load of the boxes was to be shipped to another fruit company without any stipulation as to price, the latter company would be liable for the prevailing market price at time of delivery on such quantity of boxes as were in excess of the 15,000 called for by the written contract between the original parties. *Leavenworth State Bank v. Wenatchee Valley Fruit Exchange*..... 366
6. SALES (78) — PERFORMANCE — DELAY IN DELIVERY — WAIVER — EFFECT OF ACCEPTANCE. A purchaser's acceptance of personal property in fulfillment of an executory contract of sale is a waiver of objection that it was not delivered at the time agreed, unless his acceptance was qualified by a reservation of the right to claim damages caused by the delay. *White v. Little Co.*..... 582
7. SAME (78). Where, after placing an order for trucks and trailers at a designated price, the purchaser afterwards executes conditional sale contracts for an increased price, under threats of the seller not to make delivery otherwise, and necessities of the purchaser's business forced him to agree to pay in order to get the trucks, he cannot recover the excess price in an action for damages, in case no protest was made at the time, and no payments covering the excess have been made, his proper remedy being one for reformation of the contract. *White v. Little Co.*..... 582
8. SALES (85)—CONTRACT—WHEN TITLE PASSES—INTENT—EVIDENCE—SUFFICIENCY. Whether title to a chattel has or has not passed by a contract of sale is a matter determinable by the intention of the parties, which is controlling, if clearly and unequivocally manifested by their agreement; and where the title must rest in one of two persons, evidence which determines the title as between them will determine it as between one of them and a stranger to the title who asserts it to be in the other. *Gray & Barash, Incorporated, v. Puget Sound Navigation Co.*..... 376
9. SALES (168)—CONDITIONAL SALES—CONTRACT—CONSTRUCTION. Conditional sales contracts with forfeiture provisions are not favored by

Sales—Continued.

the law, and a court will not view a contract of sale as a conditional sale until it is clearly proven to be one. *Kuhn v. Groll*..... 285

10. SALES (179-1)—CONDITIONAL SALES—ASSIGNMENT OF CONTRACT—EFFECT—RIGHTS OF SUBSEQUENT MORTGAGEE—ESTOPPEL TO ASSERT TITLE. Where an automobile dealer sells a car under a conditional sale contract, taking a promissory note for deferred installments of the price, which together with the contract is assigned to another, and, the dealer, as agent of the assignee, subsequently repossesses himself of the car for nonpayment of the balance due and places it among his stock, and mortgages it to a third party, the assignee of the contract cannot replevin the car from the mortgagee; since he brings himself within the rule that where one of two equally innocent persons must suffer, that one whose act or neglect makes a fraudulent act possible must bear the loss occasioned thereby. *General Motors Acceptance Corporation v. Arthaud Land Co.* 593

Schedule:

Of carrier's charges, see CARRIERS, 1-5.

Schools and School Districts:

Review of mandamus directing clerk to call election, see CERTIORARI.
School elections, see ELECTIONS.

1. SCHOOLS AND SCHOOL DISTRICTS (21, 25)—POWERS OF DISTRICT BOARD—TEXT BOOKS—VOTE OF ELECTORS—STATUTES—CONSTRUCTION. Under Rem. Code, § 4509, subd. 10, it is mandatory upon school boards in districts of the first class to furnish free text books to the pupils, when so ordered by vote of the electors of the district. *Hand v. School District No. 1*..... 439
2. SAME (25, 30)—TEXT BOOKS—POWER TO INCUR INDEBTEDNESS—STATUTES—CONSTRUCTION. A construction of a statute requiring free text books and supplies to be furnished pupils, on vote of the electors, as mandatory would not authorize the incurrence of debt beyond the constitutional limit, since the electoral authorization must be construed as in effect only so long as it may lawfully be carried out. *Hand v. School District No. 1*..... 439
3. SAME (25, 30). Injunction will lie to prevent a school board from selling such school books as it has on hand which are suitable for use in the schools, where free school books have been authorized by popular vote. *Hand v. School District No. 1*..... 439

Scope of Employment:

See MASTER AND SERVANT, 2, 3.

Searches and Seizures:

Seizure of liquor without warrant, see **INTOXICATING LIQUORS**, 8.

Sedition:

See **INSURRECTION**, 2.

Self-Defense:

Defenses in prosecution for homicide, see **HOMICIDE**, 2.

Sentence:

In criminal prosecutions, see **CRIMINAL LAW**, 12-14.

Separate Estate:

Of married women, see **HUSBAND AND WIFE**, 1.

Servants:

See **MASTER AND SERVANT**.

Service:

Of writ of garnishment on foreign corporation, see **CORPORATIONS**, 14.

Of notice of proceedings, see **EMINENT DOMAIN**, 3.

Servitudes:

See **EASEMENTS**.

Settlement:

By guardian without order of court, see **GUARDIAN AND WARD**.

Severable Contract:

See **CONTRACTS**, 3.

Shares:

Of corporate stock, see **CORPORATIONS**, 2, 3.

Sheriffs and Constables:

Authority to arrest without warrant, see **ARREST**.

Shipping:

Carriage of goods, see **CARRIERS**, 6-9.

1. **SHIPPING (6)—CONTRACTS—CONSIDERATION—FRAUD.** Where plaintiffs leased a boat of defendants for salmon fishing in Alaska waters under a contract requiring the lessees "to purchase a purse seine net suitable in size and quality for salmon fishing," for whose purchase price the lessors gave their promissory notes, the lessors cannot be held liable thereon for the purchase by the lessees of a net of insufficient size, represented as complying with the contract, but which was old, worn and rotten, though one of the lessors had seen it before giving the notes, but had not inspected it. *Kaufman v. Hewitt* 556

Shipping—Continued.

2. **SAME (9)—BREACH OF CHARTER BY CHARTERER.** Where the lessees of a fishing boat agreed as part of their contract to purchase a seine net, care for it while in their possession, and return it to the lessors at the close of the fishing season in as good condition as it then was, they were bailees of the seine net, and chargeable with its loss as a result of their own negligence. *Kaufman v. Hewitt* 556
3. **SAME (9, 14)—BREACH—ACTIONS.** In an action growing out of a contract for the lease of a boat during the salmon fishing season under which the lessors were to receive a proportion of the sum realized from the sale of fish caught during the season, a finding by the court on contradictory evidence that the lessees did not engage in fishing and that the value of the use of the boat during the fishing season was \$50 per day, will not be disturbed on appeal. *Kaufman v. Hewitt*..... 556
4. **SAME (9)—BREACH—DAMAGES—MEASURE OF DAMAGES.** Where a boat was leased for an Alaska salmon fishing season on the basis of a proportionate share in the catch, and the boat did not engage in fishing, the proper measure of damages is the value of the use of the boat computed on the number of days the fishing would have been profitable. *Kaufman v. Hewitt*..... 556

Signals:

On approaching railroad crossings, see RAILROADS, 1-3, 8.

Signatures:

Liability of surety in absence of signature of cosurety, see PRINCIPAL AND SURETY, 1.

Specific Performance:

Of oral agreement to convey land, see FRAUDS, STATUTE OF, 2.

1. **SPECIFIC PERFORMANCE (16-1, 17)—CONTRACTS ENFORCEABLE—ORAL AGREEMENT TO CONVEY LAND—POSSESSION AS PART PERFORMANCE.** Part performance of an oral contract to convey land is not established by evidence that a son had been given possession of the property, merely from the fact that such son had remained on the property with his parents and worked it since majority, since that would constitute no change of possession, constructive or otherwise. *Herren v. Herren*..... 56
2. **SPECIFIC PERFORMANCE (24)—DAMAGES (37)—LIQUIDATED DAMAGES—EFFECT OF STIPULATION FOR—BREACH OF CONTRACT FOR SALE OF LAND.** A provision in a contract for the sale and purchase of land fixing liquidated damages does not destroy the vendor's right of election between an action for damages and one for specific performance, unless the course of conduct of the vendor indicates that

Specific Performance—Continued.

he has accepted the provision for liquidated damages as being the full measure of his rights. *Asia Investment Co. v. Levin*..... 620

3. SPECIFIC PERFORMANCE (24-1, 28)—GIFTS—ORAL PROMISE TO CONVEY LAND—PERFORMANCE BY PLAINTIFF—EVIDENCE—SUFFICIENCY. Where a father had deeded one of his sons an undivided one-half interest in the home farm, which was community property, in which deed the mother admits she would have been willing to join had she been requested, and the evidence shows the son had worked and managed the place since attaining majority with that understanding, sufficient is shown to uphold the claim of a parol agreement for the conveyance of a one-half interest to him. *Herren v. Herren* 56

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 5-7.
Of questions submitted to voters, on ballot, see ELECTIONS, 3.
Of claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 3.

Statutes:

See FRAUDS, STATUTE OF.

Admission to practice law, see ATTORNEY AND CLIENT, 1-3.

Service of writ of garnishment on corporation, see CORPORATIONS, 14.

Punishment for criminal offenses, see CRIMINAL LAW, 12-14.

Action for wrongful death, see DEATH, 1, 2.

Contracts within statutory control, see ELECTRICITY.

Sale or encumbrance of property of estate, see EXECUTORS AND ADMINISTRATORS, 1.

Filing claims against estate, see EXECUTORS AND ADMINISTRATORS, 3.

Unlawful possession of liquor, see INTOXICATING LIQUORS, 1, 2.

Records of private marks or brands, see LARCENY, 1.

Statutes of limitation, see LIMITATION OF ACTIONS.

Labor liens, see LOGS AND LOGGING; MINES AND MINERALS.

City ordinances, see MUNICIPAL CORPORATIONS, 3-7.

Duration of term of office, see OFFICERS.

Requiring free text books for pupils, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

Exemption from taxation, see TAXATION, 4.

Qualification of voters of irrigation district, see WATERS AND WATER COURSES, 5.

Filing certificate of sale of land for delinquent irrigation tax, see WATERS AND WATER COURSES, 7.

1. STATUTES (33-36) — AMENDMENT — TIME FOR — "ENACTMENT" OF STATUTE—CONSTRUCTION. The initiative and referendum provision of the constitution (Const., Amendt. 7) prohibiting the amendment of a law approved by a majority of the electors voting thereon

Statutes—Continued.

“within a period of two years following such enactment,” contemplates the time of its complete enactment in a legal sense; accordingly, a provision of the act itself postponing the time of its taking effect to a later date would not defeat the power of the legislature to amend the act at any time after the expiration of two years from its proclamation by the governor. *State v. Gibbons* 171

2. **STATUTES (63)—CONSTRUCTION—TITLE AND HEADINGS.** While the title to an act is always a subject for consideration in ascertaining the legislative intent, a headnote, even though enacted by the legislature as a part of the act, should not be made an excuse for construing an act which is clear, plain, and concise, leaving nothing open to construction. *State v. Crothers*..... 226

3. **SAME (63)—CONSTRUCTION—TITLE AND HEADINGS—SCOPE AND SUBJECT-MATTER OF ACT—INTENT OF LEGISLATURE.** Rem. Code, § 2527, as amended by Laws 1915, p. 492, § 2, providing that “every person, who . . . being the driver of any animal or vehicle upon any public highway, street, or other public place, shall be intoxicated while engaged in the discharge of any such duties, shall be guilty of a gross misdemeanor,” includes the driver of an automobile, whether he be owner or employee, the enactment of the headnote “Intoxication of employees,” as an index of the section not being a limitation on the plain provisions of the statute showing a legislative intent to cover other classes as well as employees. *State v. Crothers* 226

Stipulations:

In contracts as to liquidated damages or penalties, see **DAMAGES**, 1, 2.

1. **STIPULATIONS (2)—CONSTRUCTION AND OPERATION.** An agreement, entered into on the trial of an action, not to issue an execution on the judgment that may be obtained therein until the trial and determination of another pending action, is sufficient to support an order staying execution on the judgment thereafter entered in the prior action, where the conditions of such agreement had not been complied with. *State ex rel. Deignan v. Smith* 194

Stock:

Corporate stock, see **CORPORATIONS**, 2, 3.

Stockholders:

Of corporations, see **CORPORATIONS**, 1, 3, 4.

Street Railroads:

1. **STREET RAILROADS (20)—ACCIDENTS AT CROSSINGS—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** The driver of an automobile truck approaching a street car crossing is guilty of such contributory negligence as to bar recovery for injuries to

Street Railroads—Continued.

his truck and person resulting from a collision with the street car, where he looks in the direction of an approaching street car before he reaches the cross-street and, seeing no car because of intervening bill boards, drives straight ahead at twelve to fifteen miles per hour, and does not look again until within about thirteen feet of the car line, when it is too late to stop his car. *Harris v. Seattle* 327

2. **STREET RAILWAYS (20)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—DRIVER OF VEHICLES.** The driver of a vehicle who crosses a street railway track between street intersections, where street cars have the right of way under a city ordinance, is under the duty of exercising continuous observation for the purpose of avoiding injury, and though his wagon was struck by a street car proceeding at an excessive rate of speed, his own contributory negligence, after noticing the car some 300 feet away, in driving slowly upon the track without again looking before reaching that point, is sufficient to bar recovery for injuries to himself and vehicle arising from a collision. *Berriat v. Washington Water Power Co.*..... 481

Streets:

See **MUNICIPAL CORPORATIONS**, 18-26.

Negligent use of highway, see **HIGHWAYS**.

Suit Money:

In action for divorce, see **DIVORCE**, 3, 6.

In action for maintenance, see **HUSBAND AND WIFE**, 6, 7.

Support:

Failure to support as ground for divorce, see **DIVORCE**, 1.

Suretyship:

See **PRINCIPAL AND SURETY**.

Surrender:

Of lease, see **LANDLORD AND TENANT**, 2.

Taxation:

Assessment for drains, see **DRAINS**, 5, 6.

Assessments for municipal improvements, see **MUNICIPAL CORPORATIONS**, 11-15.

Assessment for irrigation district, see **WATERS AND WATER COURSES**, 6, 7.

1. **TAXATION (205, 211)—EXCESSIVE ASSESSMENT—REDUCTION—TENDER OF TAX—PENALTY—STATUTES.** Where a taxpayer has tendered the full amount of tax assessed against his property, with the exception of a special road tax, within the time entitling him to a three per cent rebate under the statute, which tender was refused by the county because it did not include the road tax, on

Taxation—Continued.

the acceptance of the tender by the county on a later date, the taxpayer is not chargeable with interest on the amount of the tax because it had not actually been paid within the statutory time.

Northern Pac. R. Co. v. Franklin County..... 117

2. SAME (205, 211)—EXCESSIVE ASSESSMENT—TENDER OF TAX—PAYMENT—RIGHT TO DISCOUNT. Under Rem. Code, § 9219, allowing a rebate of three per cent for the payment of taxes in one payment on or before March 15th, a tender of the amount due prior to that date, except road taxes, which were contested, which tender was refused because road taxes were not included, entitles the taxpayer to the three per cent rebate on the acceptance of the tender by the county at later date, although the validity of the road tax had been confirmed by the courts. *Northern Pac. R. Co. v. Franklin County* 117

3. TAXATION (210)—VALUATION—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. Under Rem. Code, § 9102, providing that all property shall be assessed at its true and fair value in money, an assessment of property on the basis of its use is illegal, though it is proper to take into consideration, in assessing property, any use to which it may be put which gives it added value. *Samish Gun Club v. Skagit County*..... 578

4. TAXATION (229)—INHERITANCE TAXES—EXEMPTIONS—BEQUESTS FOR CHARITABLE PURPOSES—STATUTES—CONSTRUCTION. A bequest for the establishment of a fund for "furnishing fuel in winter time to needy poor families" is one for a charitable purpose within Rem. Code, § 9199 as amended by Laws 1917, p. 597, defining the relief of "poor people" as a charitable purpose, and thus exempt under that statute from the levy of an inheritance tax. *In re Maynes' Estate* 644

Telegraphs and Telephones:

1. TELEGRAPHS AND TELEPHONES (5)—INADEQUATE SERVICE—ACTIONS—POWERS OF PUBLIC SERVICE COMMISSION. An action for damages grounded on the poor service rendered by a telephone company to a subscriber is not within the jurisdiction of the courts in the first instance, since under Rem. Code, § 8626, the remedy for unjust and unreasonable practices on the part of a public service corporation must be sought by application to the public service commission. *Robinson v. Pacific Tel. & Tel. Co.*..... 318

Tender:

Effect on liability for costs, see COSTS, 2.

Of tax due, see TAXATION, 1, 2.

1. TENDER (4)—MODE AND SUFFICIENCY. Facts in case examined and held to constitute proper tender. *Tucker v. Lowenthal*..... 638

Term:

Of office, see OFFICERS.

Text Books:

Furnishing free text books to pupils, see SCHOOLS AND SCHOOL DISTRICTS.

Theaters and Shows:

Tickets entitling holder to chance for prize as violation of ordinance, see LOTTERIES.

Time:

For taking exception to ruling for purpose of review, see APPEAL AND ERROR, 4.

Duration of broker's contract, see BROKERS, 1, 2.

For presentation of claims against decedent's estates, see EXECUTORS AND ADMINISTRATORS, 3.

For objections to assessment for local improvement, see MUNICIPAL CORPORATIONS, 11.

Notice to surety of default of contractor, see PRINCIPAL AND SURETY, 5.

For amendment of statute, see STATUTES, 1.

Title:

To property attached, see ATTACHMENT.

Indorsement of bill of lading as passing title to goods shipped, see CARRIERS, 6-9.

Proof of title to goods shipped, see CARRIERS, 10, 11.

Jurisdiction of probate court to determine title to property, see EXECUTORS AND ADMINISTRATORS, 4.

Forfeiture of policy for change of title to property, see INSURANCE.

To support prosecution for larceny, see LARCENY, 1.

Of ordinance, see MUNICIPAL CORPORATIONS, 4, 5.

Transfer of title on sale of goods, see SALES, 8.

Of statutes, see STATUTES, 2, 3.

Torts:

See FRAUD.

Causing death, see DEATH.

Negligence in use of highway, see HIGHWAYS.

Injuries to third persons by employees, see MASTER AND SERVANT, 3.

Agents, see PRINCIPAL AND AGENT, 2.

Negligent operation of railroads, see RAILROADS.

Injuries caused by operation of street cars, see STREET RAILROADS.

Diversion of natural water courses, see WATERS AND WATER COURSES, 1.

Transcripts:

Of record for purpose of review, see APPEAL AND ERROR, 5-7.

Transfer:

- Of bill of lading, see CARRIERS, 6-9.
- Of corporate shares, see CORPORATIONS, 2, 3.

Trial:

- Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 2-4.
 - Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 5-7.
 - Presumptions on appeal, see APPEAL AND ERROR, 11.
 - Review of findings in trial by court, see APPEAL AND ERROR, 13-18.
 - Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 19-24.
 - Continuance in civil actions, see CONTINUANCE.
 - In criminal prosecutions, see CRIMINAL LAW.
 - Instructions as to measure of damages for breach of contract, see DAMAGES, 8, 9.
 - Instructions in criminal action, see HOMICIDE, 3-5.
 - Instructions in action for injuries from automobile in city streets, see MUNICIPAL CORPORATIONS, 24-26.
 - Amendment of pleadings at trial, see PLEADING, 3.
 - Motions and grounds for new trial, see NEW TRIAL.
 - Stipulations at trial of action, see STIPULATIONS.
 - Competency and examination of witnesses, see WITNESSES.
1. TRIAL (13)—VIEW OF PREMISES—DISCRETION. A view by the jury of premises where a personal injury occurred being a matter wholly within the discretion of the trial court, error cannot be founded on its denial of a request therefor. *Finn v. Bremerton*..... 381
 2. TRIAL (29)—REBUTTAL EVIDENCE—ADMISSIBILITY. Where plaintiff, injured by a fall on a sidewalk, testified she was wearing shoes with "medium height Cuban heels," the offer of rebuttal testimony that there were no shoes known to the trade having medium height Cuban heels was properly refused as not contradictory, nor within the issues, as independent evidence of contributory negligence. *Finn v. Bremerton*..... 381
 3. TRIAL (35, 38)—SUFFICIENCY OF OBJECTIONS—MOTION TO STRIKE. In an action for personal injuries inflicted on a pedestrian by an automobile, a statement, volunteered by an expert witness on speed, that an automobile could probably be stopped on a slippery street within thirty feet if it had chains on the car, even if not responsive to the question, was not erroneous in the absence of a motion to strike. *Carlson v. Herbert*..... 82
 4. TRIAL (69) — INSTRUCTIONS—PROVINCE OF JURY—ASSUMPTION BY JUDGE AS TO FACTS. In an action for negligence, in which one of the principal issues is whether there had been a collision between the automobiles of plaintiff and defendant, the assumption by the

Trial—Continued.

- court in its instructions to the jury that there had been a collision constitutes prejudicial error. *Gobel v. Finkelberg*..... 301
5. TRIAL (97)—INSTRUCTIONS—MATTERS NOT SUSTAINED BY EVIDENCE. In an action for personal injuries resulting from being struck by an automobile on alighting from a street car, it was error for the court to instruct the jury respecting provisions of an ordinance covering safety zones for street car passengers, where such ordinance was not in effect at the time of the accident. *Rowell v. Eldridge Buick Co.* 697
6. TRIAL (101)—INSTRUCTIONS ALREADY GIVEN. The refusal of requested instructions is not error where their subject-matter is covered by the instructions given. *Western Wall Board Co. v. Seattle* 340
7. TRIAL (101)—INSTRUCTIONS—REQUESTS ALREADY GIVEN. In an action upon a contract whose performance was prevented by defendant, an instruction that the measure of damages is the excess of the price plaintiff was to receive under the contract for the performance of the work over what it would have cost him to have performed the work called for in the contract being proper, it was not error to refuse a requested instruction on the same subject in different language. *Wright v. Duthie & Co.*..... 564
8. TRIAL (105)—INSTRUCTIONS—REFUSAL OF REQUESTS. In an action for personal injuries received by plaintiff from opening the wrong door and falling down a flight of steps, the refusal of a requested instruction that "it was the plain duty of plaintiff to use her sense of sight and look where she was stepping" was not error, where the jury were charged as to the duty of plaintiff to exercise reasonable care and prudence for her safety, and to determine whether the proximate cause of the accident was due to her failure to exercise such care and prudence. *Johnson v. Smith*..... 146
9. TRIAL (116)—INSTRUCTIONS—AS A WHOLE. Particular portions of instructions which as a whole correctly state the law cannot be segregated and assigned as error. *Hoffman v. Hansen*..... 73

Trover and Conversion:

Conversion by agent, see PRINCIPAL AND AGENT, 2.

Trusts:

Charitable trusts, see CHARITIES.

1. TRUSTS (6, 47)—TRANSFER OF LEGAL TITLE—CONVEYANCE TO THIRD PERSON—ENFORCEMENT OF TRUST—EVIDENCE. Where land is conveyed by a mother to a son in consideration of past services and an agreement to assist in her future support, there is no such trust impressed on the land as will enable the mother to follow the proceeds of its sale to other land purchased by him and transferred

Trusts—Continued.

to a third party, when there is no proof from which the court can determine how far the consideration for the deed from the mother had failed, nor any proof of facts brought to the third party's attention sufficient to constitute notice that the son was not vested with complete title. *Brallier v. Brallier*..... 253

2. TRUSTS (19)—RESULTING TRUST—EVIDENCE—SUFFICIENCY. Where one brother took title to farming property in his own name, no resulting trust in favor of another brother to an undivided half interest was created, where there was no evidence of the latter's having furnished one-half of the purchase money from his own funds or property. *Herren v. Herren*..... 56

Undisclosed Agency:

See PRINCIPAL AND AGENT, 3, 4.

United States:

1. UNITED STATES—WAR CONTRACT—CONSTRUCTION—DURATION. Under a contract between the government and a mill company on a 1917 form, reciting commencement of delivery in November, 1917, but which was not signed until April 1, 1918, calling for the delivery of spruce lumber for a period of eighteen months, the mill company is entitled to damages for its cancellation by the government in November, 1918. *Stler Mill Co. v. United States Spruce Production Corporation* 97
2. SAME—WAR CONTRACT—CONSTRUCTION—SUBJECT-MATTER — QUANTITY. Under the provisions of a war contract for the delivery of spruce lumber to the government for a period of eighteen months at the rate of "about 250,000 feet or more of said spruce during each month," the contract called for a delivery of 4,500,000 feet and not the entire output of the mill; and where it was cancelled after delivery of 3,915,120 feet the government was liable for the profit that could have been made on the balance of the lumber. *Stler Mill Co. v. United States Spruce Production Corporation*.. 97

Vacation:

Of settlement by guardian with ward, see GUARDIAN AND WARD, 3.

Value:

Evidence of value of property taken, see LARCENY, 2.

Variance:

Between pleading and proof in civil actions, see PLEADING, 4. . .

Vendor and Purchaser:

Employment of broker to sell lands, see BROKERS.

Liquidated damages for breach of contract for purchase of land, see DAMAGES, 1, 2.

Vendor and Purchaser—Continued.

Grant of implied easement for right of way, see EASEMENTS.

Sale of realty by executor or administrator, see EXECUTORS AND ADMINISTRATORS, 5, 6.

Fixtures as between vendor and purchaser, see FIXTURES.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.

Sale of community property, see HUSBAND AND WIFE, 3.

Effect of sale of insured property, see INSURANCE.

Transfers of ownership of personal property, see SALES.

Specific performance of contract, see SPECIFIC PERFORMANCE.

1. **VENDOR AND PURCHASER (1) — CONTRACT — SALE DISTINGUISHED FROM OPTION.** Where a contract for the sale of real property recites the receipt of a stated sum "on account of the full purchase price" named in the instrument, and is followed by provisions to the effect that a warranty deed is to be delivered on receipt of the balance of the purchase price in cash, that taxes for the assessment year are to be prorated, and that failure to complete purchase within the time limited, except for defect of title, shall operate as a forfeiture of the sum deposited, such contract constitutes a contract of purchase and sale, and not an option to purchase. *Asia Investment Co. v. Levin*..... 620
2. **VENDOR AND PURCHASER (48)—CONTRACT—FORFEITURE—DEFAULT BY VENDEE—WAIVER.** A purchaser of real property under an executory contract making time of its essence, who defaults in payments without the acquiescence of the vendor, cannot recover the amount paid on the contract, though the vendor, subsequent to the default, has sold the property to another. *Rafferty v. Gaston*..... 689
3. **VENDOR AND PURCHASER (97)—PERFORMANCE OF CONTRACT—ASSUMPTION OF MORTGAGE.** An agreement to assume and pay a mortgage on land cannot be enforced by the promisee, when the mortgage debt has not been paid by him or by some one on his behalf. *LeBank v. Eller*..... 353
4. **VENDOR AND PURCHASER (131, 133)—BONA FIDE PURCHASER—TITLE—CONSIDERATION AND GOOD FAITH—EVIDENCE—SUFFICIENCY.** Where mother and daughter, as sole heirs of an estate, joined in a deed to a tract of land belonging to the estate, for which the daughter never received any portion of her share of the consideration, the daughter has no right of action against the purchaser to recover her undivided one-half interest on the theory that he dealt in bad faith, since the purchaser was justified in assuming, when tendered a deed duly executed by mother and daughter, that the mother was authorized to receive that part of the consideration belonging to the daughter. *de la Pole v. Broughton*..... 395

Venue:

Of action against corporations, see CORPORATIONS, 10, 11.

Verdict:

Review on appeal, see **APPEAL AND ERROR**, 12.

In criminal prosecutions, see **CRIMINAL LAW**, 9.

Inadequate or excessive damages, see **DAMAGES**, 6; **DEATH**, 3.

View:

By jury in civil action, see **TRIAL**, 1.

Voters:

Of irrigation district, see **WATERS AND WATER COURSES**, 5.

Votes:

Canvass of votes at school election, see **ELECTIONS**, 4.

Voting Machines:

Term of office of custodian, see **OFFICERS**.

Wages:

Of servant, see **MASTER AND SERVANT**, 1.

Waiver:

Of error on appeal, see **APPEAL AND ERROR**, 8-10.

Of right of action by corporation, see **CORPORATIONS**, 6.

Of rights by lessee, see **LANDLORD AND TENANT**, 2.

Of demurrer, see **PLEADING**, 5.

Default or delay in delivering goods sold, see **SALES**, 6.

Rescission of contract for sale of land, see **VENDOR AND PURCHASER**, 2.

Wards:

See **GUARDIAN AND WARD**.

Warrant:

Authority to arrest without warrant, see **ARREST**.

Seizure of liquor without search warrant, see **INTOXICATING LIQUORS**, 8.

Warranty:

Implied warranty on sale of property, see **FRAUD**.

Waters and Water Courses:

Covenants in water contract, see **COVENANTS**.

Works for protection or improvement of lands, see **DRAINS**.

Exercise of power of eminent domain, see **EMINENT DOMAIN**.

1. **WATERS AND WATER COURSES (42)—DIVERSION—PRIOR APPROPRIATION—REMEDIES—INJUNCTION.** A prior appropriator of the waters of a stream is entitled to an injunction against appropriation by an-

Waters and Water Courses—Continued.

other, where the taking by the latter is not sufficiently complete and definite to afford a measurement of the damages suffered by the prior appropriator. *Ellensburg Ice & Cold Storage Co. v. Ellensburg* 647

2. **WATERS AND WATER COURSES (67, 68)—CONVEYANCES—WATER CONTRACT—RIGHTS AND LIABILITIES OF PARTIES.** The owner of lands who has a water contract providing for service of water to himself is under no obligation to provide water service to purchasers of subdivisions of his land, where the contracts do not so provide; nor is a purchaser of a tract entitled to the use of the pipe line without the owner's consent, where the pipe was laid after sale to such purchaser in such a manner as to clearly indicate the owner's dominion and control over it. *Aylmore v. Bickford*..... 28
3. **WATERS AND WATER COURSES (68)—CONTRACTS—GRANT OF EASEMENT—DEEDS—RIGHTS OF SUBSEQUENT GRANTEEES—CONSTRUCTION.** Where the owner of lands grants to a water company the sole right to take, carry away and use all the water from certain streams flowing over or across his lands, in consideration of an annual rental, an easement in the land is created, and the right to such annual rental passes to any subsequent grantee who acquires the land by warranty deed, subject to the water company's easement. *Raymond v. Armstrong* 272
4. **WATERS AND WATER COURSES (83)—PUBLIC SUPPLY—RATES—SERVICE TO PRIVATE CONSUMER—CHARGES FOR FIRE PROTECTION.** A water company which supplies water for ordinary use and also a service for protection in case of fire is entitled to charge for such fire protection in addition to the customary meter rates for the ordinary consumption of water. *North Coast Power Co. v. Pittock & Leadbetter Lumber Co.*..... 542
5. **WATERS AND WATER COURSES (89)—IRRIGATION DISTRICTS—ORGANIZATION—QUALIFICATION OF VOTERS—STATUTES—CONSTRUCTION.** Under Rem. Code, § 6418, any person who has evidence of title to land within an irrigation district, coupled with possession and actual control of the land, is entitled to a vote in the selection of officers to operate the district. *State ex rel. Holt v. Hamilton* 91
6. **WATERS AND WATER COURSES (92)—IRRIGATION—ASSESSMENTS—REDEMPTION—PERSONS ENTITLED TO REDEEM.** A landowner's association, formed to look after the individual interests of a large number of owners of property within an irrigation district extending through three counties, may properly redeem the lands of a member from sale for delinquent irrigation assessments where such action is either authorized or ratified by the landowner, since the act of the association is not the intermeddling of a stranger. *Birge v. Cunningham* 458

Waters and Water Courses—Continued.**7. SAME (92) — SALE OF LAND — RETURN AND RECORD — STATUTES.**

Where a county treasurer as ex-officio treasurer of an irrigation district sells lands within the district to satisfy delinquent assessments, his failure to file a duplicate certificate of sale in the office of the county auditor of the county in which the land is situated, as required by Rem. Code, § 6442, invalidates the sale, since the filing of such certificate in the proper county is an essential element of the sale. *Birge v. Cunningham*..... 458

Ways:

Private rights of way, see EASEMENTS.

Wills:

Findings in will contest, sufficiency to sustain decree, see APPEAL AND ERROR, 7.

Charitable bequests and devises, see CHARITIES; TAXATION, 4.

Witnesses:

Absence of witnesses as ground for continuance, see CONTINUANCE.

Experts, see CRIMINAL LAW, 5.

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 11.

Testimony of absent witnesses, see DEPOSITIONS.

1. WITNESSES (52) — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT. The rule against the admissibility in evidence of privileged communications between attorney and client does not extend to conversations between an attorney and his client respecting the compensation for services of an associate counsel. *McDermont v. Bateman* 230

2. WITNESSES (106)—IMPEACHMENT—CROSS-EXAMINATION—EVIDENCE OF FORMER CONVICTION. A defendant, prosecuted on a criminal charge, who testifies as a witness in his own behalf, may, for the purpose of impeaching his credibility, be properly cross-examined as to his having been convicted of the unlawful sale of narcotics. *State v. Cole*..... 511

Work and Labor:

Liens for services in getting out logs, see LOGS AND LOGGING.

Contracts of employment, see MASTER AND SERVANT, 1.

Liens for work and materials, see MECHANICS' LIENS; MINES AND MINERALS.

Workmen's Compensation Act:

Election of remedies by injured workman, see MASTER AND SERVANT, 2.

Writings:

Parol evidence to vary writings, see EVIDENCE, 6-9.

Writs:

See CERTIORARI; HABEAS CORPUS; MANDAMUS; PROHIBITION; QUO WARRANTO.

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